



Enforcement News

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION**

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Penalties Totaling \$1.38 Million Proposed for Tracy Dairy Properties Controlled by Henry J. Tosta

Central Valley Water Board Executive Officer proposes penalties for violations of Cleanup and Abatement Orders

For Immediate Release
November 29, 2012

Contact: Robert Busby
Phone: 916-464-4666

SACRAMENTO – The Executive Officer of the Central Valley Regional Water Quality Control Board (Regional Water Board) has issued a complaint against two San Joaquin County facilities totaling more than \$1.3 million for violations found during routine inspections and failure to comply with Cleanup and Abatement Orders.

The Regional Water Board issued a complaint for \$1,140,713 to the Henry Tosta Dairy and a complaint for \$239,563 to the Reeve Road Heifer Ranch, both in Tracy. The inspections in May 2012 identified overflowing manure storage areas at the dairy and dead cows illegally buried in cropland rented by the Heifer Ranch. Two separate Cleanup and Abatement Orders were issued in June 2012. Both facilities are operated by Henry Tosta.

“These violations are extremely serious, and are compounded by the lack of cleanup and remediation activities by the operator of these two facilities,” said Water Board Executive Officer Pamela Creedon. “The vast majority of dairy operators in the Central Valley work hard to follow good environmental practices and to abide by the Dairy General Order. The lack of good management practices at both this large dairy and the Heifer Ranch, and the operator’s blatant disregard for the law, the Dairy General Order, and the subsequent Cleanup and Abatement Orders, has created unhealthy and dangerous conditions, polluting the waters of the State of California.”

The Dairy General Order, adopted by the Regional Water Board in 2007, requires dairies to handle wastes in ways that protect surface and groundwater. The General Order contains a number of requirements, including standards for manure and dairy wastewater storage and criteria for the application of manure and dairy wastewater to cropland as fertilizer. The Order also prohibits on-site disposal of dead animals except when state, federal, or local agencies declare a state of emergency.

At the dairy, Regional Water Board inspectors found manure slurry to a depth of several feet filling the central part of the production area and encroaching on corrals where animals were housed. The majority of cows are housed away from the manure piles in free stall barns or in corrals. Wastewater lagoons had not been cleaned out or maintained, and settling basins for solid manure were completely full of manure. The Waste Management Plan prepared for the dairy did not accurately reflect the conditions at the site. These management issues pose a significant threat to water quality, especially since groundwater at the dairy is less than five feet below the surface and the dairy production area is bordered by the Naglee-Burk Main Canal. Despite repeated inspections and reminders, the discharger has failed to comply with the majority of the requirements of the Cleanup and Abatement Order, especially with requirements to remove manure piled at the dairy.

In cropland rented by the Heifer Ranch, Regional Water Board inspectors found several cow carcasses placed in a groundwater-filled excavation and evidence that as many as several hundred additional animals may be buried in the same area. After removing several carcasses, the discharger has stated that removal activities are complete, and has failed to take any steps to remove additional animal remains or provide a plan for groundwater remediation.

Waste management at the two facilities violates rules prohibiting the collection of, treatment, storage, and discharge or disposal of wastes at a milk cow dairy that results in contamination of surface water or groundwater.

The maximum penalty that may be assessed under the California Water Code for the violations at the Henry Tosta Dairy is \$2,732,000 and the minimum penalty that may be assessed is \$826,991. The maximum penalty that may be assessed under the California Water Code for the violations at the Reeve Road Heifer Ranch is \$1,080,000 and the minimum penalty that may be assessed is \$54,951. The minimum penalty is determined by the economic benefit that the facilities received because they didn't comply with the Central Valley Water Board's Dairy General Order waste discharge requirements, plus a 10% surcharge. The California Water Code allows discretion in the assessment of penalties. The Executive Officer based the penalty, in part, on the severity of the problems and the dairyman's lack of cooperation in cleanup efforts.

The Water Board's Administrative Civil Liability Complaints (including inspection reports) and sets of selected pictures illustrating site conditions at the time of the inspections are available at:

Henry J. Tosta dba Henry Tosta Dairy:

http://www.waterboards.ca.gov/centralvalley/board_decisions/tentative_orders/index.shtml#tostadairy

Henry J. Tosta dba Reeve Road Heifer Ranch:

http://www.waterboards.ca.gov/centralvalley/board_decisions/tentative_orders/index.shtml#reeverdranch

The Central Valley Water Board is a California state agency responsible for the preservation and enhancement of water quality. For more information on the Central Valley Water Board, please visit the home page at:

<http://www.waterboards.ca.gov/centralvalley/>



Enforcement News

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD CENTRAL VALLEY REGION

<http://www.waterboards.ca.gov/centralvalley>

TRACY HEIFER RANCH FINED \$310,775 FOR WATER QUALITY VIOLATIONS

For Immediate Release

Contact: Robert Busby

Feb.24, 2014

Phone: (916) 464-4666

SACRAMENTO – The Central Valley Regional Water Quality Control Board (Central Valley Water Board) has imposed a penalty of \$310,775 against the Reeve Road Heifer Ranch, located in Tracy, San Joaquin County, for water code violations found during a closure inspection.

The ranch operator, Henry J. Tosta, owns the nearby Henry Tosta Dairy, which was the subject of a \$685,000 penalty imposed by the Central Valley Water Board in July 2013 for the discharge of manure to groundwater and the failure to comply with a separate CAO.

“Henry Tosta has a history of operating his facilities with complete disregard for the protection of groundwater and surface water,” said Central Valley Water Board Executive Officer Pamela Creedon. “This operator has demonstrated a blatant refusal to comply with the law, the Dairy General Order, and the Cleanup and Abatement Order directing him to fix the problems at his heifer ranch.”

A May 2012 inspection identified numerous violations at the heifer ranch and, in June 2012, the Regional Water Board issued a CAO.

Inspectors found two dead cows in a groundwater-filled excavation in heifer ranch cropland. According to Tosta, the dead cows were from the Henry Tosta Dairy. Cow bones were strewn across the 30 acre field. Photos showing burials in progress were provided to the Central Valley Water Board by an informant after the CAO was issued. In addition, cows had been buried in manure south of the heifer ranch lagoon, and additional bones were found in manure removed from the lagoon. Groundwater is five to six feet below the surface.

The penalties were assessed for the burial of cows, causing the pollution of groundwater, failure to remove manure mixed with animal remains to a landfill, and late submittal of reports to document the removal of the buried cows and provide a plan to remediate the groundwater.

The Dairy General Order (Order), adopted by the Central Valley Water Board in 2007 and updated in 2013, requires dairies to manage their waste to reduce impacts to surface water and groundwater. The Order contains a number of requirements, including standards for manure storage, prohibitions against the on-site burial of dead animals, and the prohibition of the collection, treatment, storage, discharge, or disposal of waste that results in contamination or pollution of surface water or groundwater.

Central Valley Water Board inspectors found that the heifer ranch contributed to the pollution of groundwater. Additionally, despite repeated inspections and reminders, Tosta failed to comply with directives of the CAO, including requirements to remove the pile of manure and animal remains and haul it to a landfill.

Due to continued violations, the Central Valley Water Board's executive officer issued an Administrative Civil Liability Complaint in November 2013 proposing the fine of \$310,775, which was adopted by the Central Valley Water Board members on Feb. 6, 2014.

For more information please visit:

http://www.waterboards.ca.gov/centralvalley/board_decisions/adopted_orders/san_joaquin/r5-2014-0009_aclo.pdf

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CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

CLEANUP AND ABATEMENT ORDER R5-2012-0708

FOR

HENRY J. TOSTA (DBA HENRY TOSTA DAIRY)
AND HENRY J. TOSTA TRUST

SAN JOAQUIN COUNTY

This Order is issued to Henry J. Tosta, Henry J. Tosta Trust (Henry J. Tosta, trustee) owner and operator of the Henry Tosta Dairy (hereafter collectively referred to as "Discharger"), pursuant to California Water Code ("Water Code") section 13304, which authorizes the California Regional Water Quality Control Board, Central Valley Region (hereafter "Central Valley Water Board" or "Board") to issue a Cleanup and Abatement Order ("CAO"), and Water Code section 13267, which authorizes the Central Valley Water Board to require the preparation and submittal of technical and monitoring reports. This order covers only those water quality violations associated with the Henry Tosta Dairy's operations that occurred on land owned by the Henry J. Tosta Trust.

The Executive Officer of the Central Valley Water Board finds, with respect to the Discharger's acts or failure to act, the following:

FINDINGS

PROPERTY OWNERSHIP AND OPERATIONS

1. Henry Tosta Dairy (hereafter "Henry Tosta Dairy" or "Dairy") (WDID 5B39NC00154) is located at [REDACTED], Tracy, San Joaquin County. The property is owned by the Henry J. Tosta Family Trust. Henry J. Tosta operates Henry Tosta Dairy.

LEGAL AND REGULATORY AUTHORITY

2. This Order conforms to, and implements policies and requirements of, the Porter-Cologne Water Quality Control Act (Division 7, commencing with Water Code section 13000) including: (1) Water Code sections 13267 and 13304; (2) applicable state and federal regulations; (3) the 2007 Central Valley Regional Water Quality Control Board Waste Discharge Requirements for Existing Milk Cow Dairies General Order R5-2007-0035 (Dairy General Order); (4) all applicable provisions of Statewide Water Quality Control Plans adopted by the State Water Resources Control Board (State Board) and the *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins*, Fourth Edition, revised October 2011, (hereafter "Basin Plan") adopted by the Regional Board;

(5) State Board policies and regulations, including State Board Resolution No. 68-16 (Statement of Policy with Respect to Maintaining High Quality of Waters in California), and Resolution No. 92-49 (Policies and Procedures for Investigation and Cleanup and Abatement of Discharges under Water Code section 13304) ("Resolution 92-49"); California Code of Regulations (CCR) Title 23, Chapter 16, Article 11; CCR Title 23, Section 3890 et. seq., and (6) relevant standards, criteria, and advisories adopted by other state and federal agencies.

3. **Waste Discharge Requirements:** Water Code section 13263(a) allows a regional board to prescribe requirements as to the nature of any proposed discharge, existing discharge, or material change in discharge of waste to waters of the state. The Central Valley Water Board has determined that the discharge of nitrates, salts, and other waste from many dairies in the Central Valley region have impacted groundwater, a water of the state. The Central Valley Water Board may prescribe general waste discharge requirements to a category of discharges, such as those from ongoing dairy operations, if the discharges are produced by the same or similar operations, the discharges involve the same or similar types of waste, the discharges require the same or similar treatment standards, and the discharges are more appropriately regulated under general requirements than individual requirements.

The Dairy General Order is a set of general waste discharge requirements that apply to owners and operators of existing milk cow dairies that (1) submitted a Report of Waste Discharge in response to the Central Valley Water Board's August 8, 2008 request and (2) have not expanded operations since October 17, 2005. Dairy farms covered by the Dairy General Order are subject to the general waste discharge requirements for discharges of waste from existing milk cow dairies. The Discharger is required to file a Report of Waste Discharge with the Central Valley Water Board at least 140 days before making any material change in the character, location, or volume of the discharge including, but not limited to the addition of new waste water that results in a change in the character of the waste; significantly changing the disposal or waste application method or location; significantly changing the method of treatment; increasing the discharge flow beyond that specified in the Dairy General Order, and/or expanding the existing herd size beyond 15 percent. Henry J. Tosta owns and operates the Henry Tosta Dairy which is a dairy operation covered by the Dairy General Order.

4. **Basin Plan:** The Dairy is located in the San Joaquin River Watershed, San Joaquin Delta subarea, in the Sacramento and San Joaquin River Basin. The Basin Plan covers the San Joaquin River Watershed. Chapter IV of the Basin Plan also contains a policy for the *Investigation and Cleanup of Contaminated Sites*. The strategy generally outlines a process that includes site investigation, source removal or containment, information requirements for the consideration of establishing cleanup levels, and a basis for establishing soil and groundwater cleanup levels. Pursuant to Water Code section 13263(a), the Dairy General Order implements the Basin Plan. Henry Tosta Dairy is covered by the Dairy General Order and is also subject to the prohibitions and requirements of the Basin Plan.

5. **State Board Policies:** The State Water Resources Control Board ("State Water Board") has adopted Resolution 92-49, *Policies and Procedures for Investigation and Cleanup and Abatement of Discharges under Water Code Section 13304* ("Resolution 92-49"). Resolution 92-49 sets forth the policies and procedures to be used during an investigation and cleanup of a polluted site, and requires that cleanup levels be consistent with State Water Board Resolution 68-16, the *Statement of Policy With Respect to Maintaining High Quality of Waters in California*. ("Resolution 68-16"). Resolution 92-49 requires the waste to be cleaned up in a manner that promotes attainment of either background water quality, or the best water quality which is reasonable if background levels of water quality cannot be restored. Any alternative cleanup level to background must: (1) be consistent with the maximum benefit to the people of the state; (2) not unreasonably affect present and anticipated beneficial use of such water; and (3) not result in water quality less than that prescribed in the Basin Plan and applicable Water Quality Control Plans and Policies of the State Water Board.

BACKGROUND

6. The Henry Tosta Dairy at [REDACTED] was purchased by Henry J. Tosta in 1994. A dairy facility has been in operation on the property intermittently since 1962. The property was inactive at the time of its purchase in 1994; in 1995, Henry Tosta filed a Form 200 with the Central Valley Water Board to reopen the Dairy. The Dairy is permitted under the Dairy General Order to house up to 1,196 mature dairy cows, and currently houses 1,180 mature cows. The Dairy's production area occupies approximately 20 acres, with milk cows housed in one freestall barn with scraped lanes and an adjoining corral. Support stock is kept in corrals. Manure from the freestall barn is scraped into a large open area at the east end of the barn. There are a total of seven wastewater storage lagoons/settling basins at the Dairy, but there are no mechanisms apparent and no evidence of any attempt to move scraped manure into the lagoons/settling basins or to export the scraped manure from the dairy. Depth to groundwater in the production area is five feet or less, based on data from monitoring wells collected in 1996. There are 428 acres of cropland associated with the Dairy, but according to the most recent annual report, for the 2010 calendar year, no solid manure or manure wastewater was applied to the cropland.
7. The Dairy production area is surrounded by cropland on the west, north, and east sides. Some of the cropland is owned and farmed by Henry Tosta, and some of the cropland is farmed by Henry Tosta but owned by Echeverria Brothers Dairy General Partnership. Tosta Dairy has identified much of this cropland as a Land Application Area in its Nutrient Management Plan. Land Application Areas are considered to be part of the Dairy facility for purposes of the Dairy General Order.
8. On the south side, the Dairy production area is bordered by the Main Drain canal of Naglee-Burk Irrigation District, which flows northwest through cropland owned by Echeverria Brothers Dairy General Partnership and farmed by Henry Tosta. At Bethany

Road, the Main Drain canal enters an underground pipe which trends due north and discharges into the Old River. On 3 February 2003, a settlement agreement was reached between Henry Tosta and the Deputy District Attorney for San Joaquin County in the sum of \$141,730 for discharges of manure wastewater into the Main Drain canal from cropland controlled by Henry Tosta.

9. On 24 April 2012, Central Valley Water Board staff ("Staff") scheduled an appointment with Henry Tosta to conduct a routine compliance inspection of the Henry Tosta Dairy. On 1 May 2012, Central Valley Water Board staff conducted the inspection of the facility. During the 1 May 2012 inspection (hereinafter "the Inspection"), staff identified **onsite violations** and **record-keeping violations** at the Henry Tosta Dairy. **(See Attachment 1).**

VIOLATIONS

10. **Onsite violations of Dairy General Order:** Staff identified the following onsite violations, including
- a. Slurry manure issues in the Production Area of Henry Tosta Dairy – At the time of the Inspection large quantities of slurry manure were stored in a central portion of the production area of the Dairy, approximately 3 to 4 acres in size, in a location without any defined boundaries or drainage controls, and with no evidence that the slurry was managed in any way. Manure slurry in this area was approximately three feet deep. The location where the slurry is placed in the production area is not identified as a manure storage area in the Waste Management Plan.

The collection and storage of waste that results in the (1) discharge of waste constituents in a manner which could cause degradation of surface water or groundwater, (2) contamination or pollution of surface water or groundwater or (3) a condition of nuisance is a violation of Prohibition A4 of the Dairy General Order.
 - b. Lagoon issues in the Production Area of Henry Tosta Dairy – At the time of the Inspection, the complex of wastewater storage lagoons and settling basins at the Dairy showed excessive vegetation and manure on and adjacent to the embankments, exhibited no definition between any of the impoundments. Solid manure was being used to reinforce embankments, and no staff gages existed in the lagoons or settling basins. It was difficult for Staff to determine lagoon dimensions or embankment integrity due to the dilapidated condition of these facilities. The methods by which liquids were moved into the lagoons/settling basins system or transferred between the lagoons and settling basins was unclear. The two settling basins had no freeboard; a minimum of one foot of freeboard is required. Lack of the required freeboard is a violation of General Specifications B1

and B10 of the Dairy General Order, and the lack of maintenance (no definition of pond boundaries, excess weeds and piled manure) violates General Specifications B1 and B11. The use of manure to construct containment structures or to repair, replace, improve, or raise existing containment structures is a violation of Prohibition 13 of the Dairy General Order. Lack of a pond level marker is a violation of General Specification B13 of the Dairy General Order.

- c. Well Maintenance Issues at Henry Tosta Dairy – A monitoring well network of three wells was installed at the Henry Tosta Dairy in 1996 as a requirement by the Central Valley Water Board and the San Joaquin County Department of Environmental Health, as part of the reactivation of the existing dairy at that location. At the time of the Inspection, two of the monitoring wells could not be located; a third well was surrounded by manure slurry. It appears that one or more of the required monitoring wells may be buried in manure slurry.

Well #1 at the Dairy requires installation of a well pad and does not comply with setback requirements in the General Order. Improperly maintained wells can cause degradation of groundwater quality in violation of Prohibition A4 of the Dairy General Order. Setbacks and separations are required pursuant to Standard Provision B18 in the Standard Provisions and Reporting Requirements of the Dairy General Order. Improperly maintained wells and lack of setbacks can allow wells to serve as conduits to groundwater for surface water and/or wastes.

- d. Storage and Disposal of Waste– The onsite waste management operations exhibited at the Dairy violates Prohibition A4 of the Dairy General Order, prohibiting the collection, treatment, storage, discharge or disposal of wastes at an existing milk cow dairy that results in (1) the discharge of waste constituents in a manner which could cause degradation of surface water or groundwater, (2) contamination or pollution of surface water or groundwater or (3) a condition of nuisance.

- 11. **Record-keeping violations:** The **record-keeping violations** were inaccuracies in the Waste Management Plan (WMP) and the Nutrient Management Plan for the Henry Tosta Dairy. The Waste Management Plan does not accurately reflect the conditions in the production area, including the use of the area where slurry is deposited. The WMP indicates silage leachate is routed to Settling Basin #1, which is incorrect; the conveyance channel routes silage leachate through a corral to an area west of the wastewater lagoons that was not designed to store waste. The Nutrient Management Plan indicates that solid manure is applied to cropland; however, neither solid manure nor wastewater is applied to any cropland. Inaccuracies in the Waste Management Plan are a violation of Attachment B to the Dairy General Order which requires that the Waste Management

Plan ensure that the production area of the dairy facility is designed constructed, operated and maintained so that dairy waste are managed to prevent adverse impacts to groundwater and surface water quality (page B-1).

LEGAL AUTHORITY

12. CWC section 13304(a) states, in relevant part:

Any person who has discharged or discharges waste into waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a regional board or by the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including but not limited to, overseeing cleanup and abatement efforts...Upon failure of any person to comply with the cleanup or abatement order, the Attorney General, at the request of the regional board, shall petition the superior court for that county for the issuance of an injunction requiring the person to comply with the order...

13. CWC section 13304(c)(1) states, in relevant part:

The person or persons who discharged the waste, discharges the waste, or threatened to cause or permit the discharge of the waste within the meaning of subdivision (a), are liable to that government agency to the extent of the reasonable costs actually incurred in cleaning up the waste, abating the effects of the waste, supervising cleanup or abatement activities, or taking other remedial actions.

14. CWC section 13267(b)(1) states, in relevant part:

In conducting an investigation specified in subdivision (a), the regional board may require that any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge waste within its region, or any citizen or domiciliary, or political agency or entity of this state who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge, waste outside of its region that could affect the quality of waters within its region shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires. The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports. In requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports.

15. Pursuant to Water Code section 13267, subdivision (b), this Order requires the Discharger to submit technical and monitoring reports, including but not limited to work plans, to Central Valley Water Board Staff. The Central Valley Water Board requires technical and monitoring reports to determine the extent of the impacts of

the discharge of waste and to assess additional cleanup and/or remediation measures at Henry Tosta Dairy.

16. The May 2012 Inspection found that ongoing dairy operations on Henry Tosta Dairy are discharging waste into waters of the state in violation of the Dairy General Order, as demonstrated in Finding 10. Operations at the Henry Tosta Dairy have also caused or permitted and threaten to cause or permit waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and create or threatens to create, a condition of pollution or nuisance, as demonstrated in Finding 10.
17. The Water Board has considered the financial and technological resources available to the Discharger, and has determined that the cleanup directives required by this Order are feasible to implement and will be effective and necessary to protect the water quality of waters of the state. Therefore, the Executive Officer is authorized to issue this Cleanup and Abatement Order in accordance with Water Code sections 13304 and 13267 to the Discharger to cleanup and abate the effects of the discharge of waste from Henry Tosta Dairy.

DIRECTIVES

IT IS HEREBY ORDERED that, pursuant to CWC sections 13304 and 13267 that the Discharger shall take the following actions to comply with this Order:

1. **By 25 June 2012**, develop a plan for the Production Area of Henry Tosta Dairy which:
 - a. addresses removal of all slurry manure in the 3 to 4 acre central portion of the Production Area **by 27 August 2012**,
 - b. addresses removal of all manure within the two settling basins by **27 September 2012**, and
 - c. addresses removal of excess vegetation, excess manure, and manure used for construction on the six lagoons, and installation of staff gages, by **27 September 2012**.

The plan must be submitted to the Central Valley Water Board for approval. Removal of manure must commence **by 2 July 2012**.

2. **By 29 June 2012**, permanently cap the pipe that extends from Settling Basing #1 to the Main Drain canal of the Naglee Burk Irrigation District

3. **By 29 June 2012**, install a concrete pad around Well #1 and install controls to ensure that 100 feet of separation is maintained between the well and manured areas as required by Standard Provision B18 in the Standard Provisions and Reporting Requirements of the Dairy General Order.
4. **By 23 July 2012**, locate and sample the three monitoring wells in the Production Area of the Henry Tosta Dairy and submit the results to the Central Valley Water Board. Depth to water in the wells shall be measured, and the groundwater tested for total dissolved solids, pH, nitrate-nitrogen, ammonia-nitrogen, total and fecal coliform, and standard minerals (calcium, magnesium, sodium, bicarbonate, carbonate, sulfate, and chloride).
5. **By 27 August 2012, using a hydropunch or other similar method**, collect one-time groundwater samples in the 3 to 4 acre area where slurry manure was placed and submit the results to the Central Valley Water Board. Depth to water in the area shall be measured, and the groundwater tested for total dissolved solids, pH, nitrate-nitrogen, ammonia-nitrogen, total and fecal coliform, and standard minerals (calcium, magnesium, sodium, bicarbonate, carbonate, sulfate, and chloride).
6. **By 27 August 2012**, submit a revised Waste Management Plan for the Henry Tosta Dairy to the Central Valley Water Board that accurately describes how the settling basins and the lagoons in the Production Area will be operated in conformance with the Dairy General Order, including a description of modifications needed to manage slurry manure within the existing constructed settling basin/lagoon system.
7. If groundwater samples in the vicinity of the Dairy area indicate that waste disposal has caused pollution of groundwater, by **27 September 2012**, submit a plan for the remediation of the groundwater. The plan shall also include an engineering evaluation of the impacts of the existing lagoons and settling basins on groundwater quality and a proposal for remedial measures, as required by General Specification B5 of the Dairy General Order.
8. Upon approval of the proposed remedial actions by the Central Valley Water Board, the discharger will have 360 days to implement any necessary changes to the existing lagoons and settling basins to ensure they are protective of water quality.

GENERAL REQUIREMENTS

The Discharger shall:

9. As required by the California Business and Professions Code sections 6735, 7835, and 7835.1, have reports prepared by, or under the supervision of, a registered professional engineer or geologist and signed by the registered

professional. All technical reports submitted by the Discharger shall include a cover letter signed by an authorized representative of the Discharger, certifying under penalty of law that the signer has examined and is familiar with the report and that to their knowledge, the report is true, complete, and accurate. The Discharger shall also state if it/they agree with any recommendations/proposals and whether it/they approved implementation of said proposals.

10. The Discharger will obtain all local and state permits and access agreements necessary to fulfill the requirements of this Order prior to beginning the work. The Discharger will continue any remediation or monitoring activities until such time as the Executive Officer determines that sufficient assessment and/or remediation has been accomplished to fully comply with this Order and this Order has been either amended or rescinded in writing.
11. If, for any reason, the Discharger is unable to perform any activity or submit any document in compliance with the schedule set forth herein, or in compliance with any work schedule submitted pursuant to this Order and approved by the Executive Officer, the Discharger may request, in writing, an extension of the time specified. The extension request shall include justification for the delay. Any extension request shall be submitted as soon as the situation is recognized and no later than the compliance date. An extension may be granted by revision of this Order or by a letter from the Executive Officer. Extension requests not approved in writing by the Executive Officer with reference to this Order are denied.
12. Reimburse the Central Valley Water Board for reasonable costs associated with oversight of the investigation and remediation of the Site, as provided in Water Code section 13304(c) (1). Failure to reimburse the Central Valley Water Board's reasonable oversight costs shall be considered a violation of this Order.
13. This Order does not limit the authority of the Water Board to institute additional enforcement actions or to require additional investigation and cleanup of the site consistent with the Water Code. This Order may be revised by the Executive Officer as additional information becomes available. **Failure to comply with the terms or conditions of this Cleanup and Abatement Order will result in additional enforcement action**, which may include the imposition of administrative civil liability pursuant to CWC including sections 13350, 13385 and 13268 or referral to the Attorney General of the State of California for civil enforcement.

REPORTING REQUIREMENTS

1. **Signatory Requirements.** All reports required under this Cleanup and Abatement Order shall be signed and certified by the Discharger or by a duly authorized representative of the Discharger and submitted to the Water Board staff. A person is a

duly authorized representative of the Discharger only if: (1) the authorization is made in writing by the Discharger and (2) the authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility of activity. (A duly authorized representative may thus be either a named individual or any individual occupying a named position).

2. **Certification.** Include the following signed certification with all reports submitted pursuant to this Order:

I certify under penalty of perjury under the laws of the State of California that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

3. **Report Submittals.** All monitoring and technical reports required under this Order shall be submitted to:

California Regional Water Quality Control Board
Central Valley Region - Sacramento Office
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670
Attn: Charlene Herbst, Chief, Confined Animal Unit
Email: cherbst@waterboards.ca.gov
Phone: (916) 464-4724

Notifications:

4. **Cost Recovery.** Pursuant to Water Code section 13304, the Water Board is entitled to, and may seek, reimbursement for all reasonable costs actually incurred by the Water Board to investigate unauthorized discharges of wastes and to oversee cleanup of such waste, abatement of the effects thereof, or other remedial action required by this Order.
5. **Applicability of Other Orders.** This Order does not affect the Discharger's obligation to comply with any previously issued Orders, including the 2007 Dairy General Order (R5-2007-0035). The requirements and legal enforceability of these Orders are not superseded or affected upon issuance of this Order.

6. **California Environmental Quality Act (CEQA) Compliance.** The issuance of this Order is an enforcement action taken by a regulatory agency and is exempt from the provisions of the California Environmental Quality Act (Pub. Resources Code § 21000 et seq.), pursuant to California Code of Regulations (CCR), title 14, section 15321(a)(2). The issuance of this Order may also be considered an action by a regulatory agency for the protection of the environment, exempt pursuant to CCR, title 14, section 15308. This action is also exempt from the provisions of CEQA in accordance with section 15061(b) (3) of Chapter 3, Title 14 of the California Code of Regulations because it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.
7. **Requesting Administrative Review by the State Water Board.** Any person aggrieved by an action of the Water Board that is subject to review as set forth in Water Code section 13320, subdivision (a), may petition the State Water Resources Control Board (State Water Board) to review the action. Any petition must be made in accordance with Water Code section 13320 and California Code of Regulations, title 23, section 2050 and following. The State Water Board must receive the petition within 30 days of the date the action was taken, except that if the thirtieth day following the date the action was taken falls on a Saturday, Sunday, state holiday, then the State Water Board must receive the petition by 5:00 p.m. on the next business day. Copies of the law and regulation applicable to filing petitions may be found on the internet at: <http://www.waterboards.ca.gov/publicnotices/petitions/waterquality> or will be provided upon request.
8. **Enforcement Notification.** If, in the opinion of the Executive Officer, the Discharger fails to comply with the provisions of this Order, the Executive Officer may refer this matter to the Attorney General for judicial enforcement or may issue a complaint for administrative civil liability. Failure to comply with the terms or conditions of this Cleanup and Abatement Order may result in additional enforcement action, which may include the imposition of administrative civil liability pursuant to Water Code section 13350 and/or section 13268, in an amount not to exceed **\$5,000 for each day in which the violation occurs** under Water Code section 13304 or 13350, or referral to the Attorney General of the State of California for injunctive relief or civil or criminal liability.

This Order is effective upon the date of signature.

Original signed by Rick Moss for

PAMELA C. CREEDON, Executive Officer

11 June 2012

(Date)



Aerial photo of Henry Tosta Dairy's production area. Note the large amount of manure to the right of all the structures on property. Excessive manure has been accumulating on site for at least the last five years.



Photo taken from the northeast corner of the production area looking to the southwest; note lack of distinction between manure storage areas. Excessive manure has been allowed to accumulate.



Photo of uncontrolled wastewater creeping into a corral at the Henry Tosta Dairy.



Photo of cows at the Henry Tosta Dairy standing in wastewater and manure slurry that has backflowed from the wastewater pond located to the right of the corral fence.



Photo of puddles of wastewater remaining on the lagoon embankments adjacent to the solids settling basin; puddles of wastewater demonstrate the embankments of the solids settling basin had recently over-topped.



Photo of solids settling basin #2. Note excessive accumulated manure and wastewater contained in the basin; no freeboard was observed.

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT R5-2012-0561

IN THE MATTER OF

HENRY J. TOSTA (DBA HENRY TOSTA DAIRY), HENRY J. TOSTA JR. FAMILY LIMITED
PARTNERSHIP, AND HENRY J. TOSTA TRUST
SAN JOAQUIN COUNTY

This Complaint is issued to Henry J. Tosta (dba Henry Tosta Dairy), Henry J. Tosta Jr. Family Limited Partnership, and Henry J. Tosta Trust (hereafter collectively referred to as Discharger) pursuant to California Water Code (Water Code) section 13323. This Complaint is based on allegations that the Discharger violated provisions of the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (Dairy General Order) for discharging waste resulting in degradation and pollution to groundwater, Water Code section 13267 for failing to furnish a technical or monitoring program report, and Water Code sections 13267 and 13350 for failing to comply with Cleanup and Abatement Order No. R5-2012-0708.

The Executive Officer of the Regional Water Quality Control Board, Central Valley Region (hereinafter Central Valley Water Board) alleges, with respect to the Discharger's acts, or failure to act, the following:

Background

1. Henry J. Tosta operates Henry Tosta Dairy (Tosta Dairy) located at 20662 San Jose Road, Tracy, San Joaquin County. The Henry J. Tosta Jr. Family Limited Partnership owns the real property located at 20662 San Jose Road, Tracy, San Joaquin County.
2. On 3 May 2007, the Central Valley Water Board adopted the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order No. R5-2007-0035 (hereinafter Dairy General Order) (Exhibit 1) and a Monitoring and Reporting Program (hereinafter MRP) that accompanies the Dairy General Order (Exhibit 2). The Dairy General Order and the MRP contain reporting requirements for dairies regulated by the General Order. The General Order became effective on 9 May 2007. The Dairy General Order is a set of general waste discharge requirements that apply to owners and operators of existing milk cow dairies that (1) submitted a Report of Waste Discharge in response to the Central Valley Water Board's 5 August 8, 2005 request and (2) have not expanded operations since 17 October 2005.
3. The Tosta Dairy is enrolled under the Dairy General Order. The Discharger submitted a Report of Waste Discharge on 18 October 2005 (Exhibit 3) and has not expanded operations since 17 October 2005. The facility is currently an operating dairy and, as of 31 December 2011, houses 1,196 mature cows. As an enrolled facility, the Tosta Dairy is subject to the requirements of the Dairy General Order for regulatory purposes.
4. The Tosta Dairy was purchased by the Discharger in 1994, and a dairy facility has been in operation on the property since 1962. The Tosta Dairy is located to the west of the city of

Tracy, within the legal boundaries of the Sacramento-San-Joaquin Delta (Exhibits 4 and 5). The Tosta Dairy production area occupies approximately 20 acres, and includes one freestall barn with scraped lanes and adjacent corrals, and corrals to house support stock. The scraped lanes were originally designed to discharge to a pond (Settling Basin #1). There is one additional settling basin (Settling Basin #2) and five wastewater lagoons. There are 687 acres of cropland associated with the Tosta Dairy, which occasionally receive manure and dairy wastewater.

5. The Tosta Dairy production area is surrounded on the southeast by another dairy farm (Ornellas Dairy #1); by Discharger-owned cropland to the northeast, north, and south; and by cropland farmed by the Discharger and owned by the Echeverria Brothers Dairy General Partnership on the west. The south perimeter of the Tosta Dairy production area is bordered by the Main Drain canal of the Naglee-Burk Irrigation District, which flows northwest through cropland owned by Echeverria Brothers Dairy General Partnership and farmed by Henry Tosta. At Bethany Road, the Main Drain canal enters an underground pipe which trends due north and discharges into the Old River.

Alleged Violations

On 1 May 2012 the Central Valley Water Board performed a routine compliance inspection of the Tosta Dairy. During the 1 May 2012 inspection (hereinafter the May Inspection), Board staff identified the following violations of the Dairy General Order and inadequacies and deficiencies in the Waste Management Plan.

Violation #1: Manure Discharge to Ground Water

6. Dairy General Order Prohibition A.4 states:

The collection, treatment, storage, discharge or disposal of wastes at an existing milk cow dairy that results in (1) discharge of waste constituents in a manner which could cause degradation of surface water or groundwater except as allowed by this Order, (2) contamination or pollution of surface water or groundwater, or (3) a condition of nuisance (as defined by the California Water Code Section 13050) is prohibited.

7. On 1 May 2012 the Central Valley Water Board performed a routine compliance inspection of Tosta Dairy. (Exhibit 6) Staff identified onsite violations included deposition of slurry manure from the freestall barn into a 3 to 4 acre area not designed to store waste, and which is not contained or graded to prevent ponding. This area contains manure to a depth of one to three feet.
8. On 12 July 2012 Board staff inspected the Tosta Dairy and sampled the three monitoring wells (Exhibit 7). Monitoring well MW-2 (MW-2) is located in the central part of the production facility immediately adjacent to Settling Basin #1. At the time MW-2 was sampled, the area in and around the wellhead was covered with manure solids and slurry such that shoveling of manure was required to access the wellhead. Nitrate as nitrogen was detected at 13.5 mg/L. Total Dissolved Solids (TDS) was detected at 14,700 mg/L.

9. The Discharger's consultant, Western Dairy Design Associates, submitted sampling results in response to Directive 4 of the CAO which required locating and sampling of existing monitoring wells and submission of the sampling results by 23 July 2012. (Exhibit 8) The results of the sampling indicate a very high concentration of nitrate-nitrogen together with a low concentration of ammonia-nitrogen in the well nearest to the 3 to 4 acre manure disposal area.
10. On 10 October 2012 the Discharger sampled MW-2. Nitrate as nitrogen was detected at 26 mg/L and TDS was detected at 15,302 mg/L (Exhibit 9).
11. Groundwater samples from MW-2 were obtained at a level approximately less than seven feet below ground surface. The monitoring wells located in the production area indicate an alteration in the quality of waters of the groundwater by waste to a degree which unreasonably affects the waters for beneficial uses. For both samples collected by Board staff and the Discharger, concentrations of nitrate as nitrogen, 13.5 mg/L and 26 mg/L, respectively, exceed the primary Maximum Contaminant Level (MCL) of 10 mg/L. Additionally, the samples collected by Board staff and the Discharger indicate concentrations of TDS, 14,700 and 15,302, respectively, exceeding the secondary MCL, which ranges from 500 mg/L to 1,500 mg/L. Given the close proximity of manure solids and slurry to MW-2 and the shallow depth to groundwater (less than seven feet), the exceedances of primary and secondary MCLs indicates the waste has unreasonably affected groundwater quality resulting in exceedances of water quality objectives and, therefore, causing degradation and pollution of groundwater in violation of Prohibition A.4.
12. The Discharger submitted Annual Reports for calendar years 2007, 2008, 2009, 2010, and 2011. During this five year period, the Tosta Dairy reported an average of 1,124 mature cows and generated a total of 142,660 tons of manure. Board staff summarized the Annual Report results from 2007 through 2011 for manure management in Exhibit 10. Based on a review of the submitted data in these five Annual Reports, a total of 3,332 tons of manure was reportedly applied to the Tosta Dairy cropland and a total of 10,445 tons of manure was exported offsite. This results in 131,052 tons of manure remaining in the Tosta Dairy production area. Board staff estimate this amount of manure accounts for the excessive manure conditions seen at the Tosta Dairy, starting with Board staff's 1 May 2012 Inspection. According to the WMP for the Tosta Dairy, received 21 September 2010 (Exhibit 11), the lagoon system has a storage capacity of 10,397,000 gallons or 41,699 tons of waste per storage period of 120 days. Given that the waste remained onsite, the amount of waste to be managed, 131,052 tons, far exceeds the storage capacity of 41,699 tons.
13. The Prosecution Team alleges the Discharger violated Prohibition A.4 of the Dairy General Order from at least 1 May 2012, the date of the initial inspection until 16 November 2012, for a total of 200 days. The Prosecution Team selected 1 May 2012 as the start date of this violation given that the manure waste at the Tosta Dairy remained unchanged from the 1 May 2012 Inspection until the time when Board staff sampled groundwater on 12 July 2012.
14. Liability for this violation may be imposed pursuant to Water Code Section 13350. Water Code section 13350 states, in part:

(a) Any person who . . . (2) in violation of any waste discharge requirement, waiver condition, certification, or other order or prohibition issued, reissued, or amended by a regional board or the state board, discharges waste, or causes or permits waste to be deposited where it is discharged, into the waters of the state ... shall be liable civilly, and remedies may be proposed, in accordance with subdivision (d) or (e).

Subdivision (e) provides, in part:

The state board or a regional board may impose civil liability administratively pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 either on a daily basis or on a per gallon basis, but not both.

(1) The civil liability on a daily basis may not exceed five thousand dollars (\$5,000) for each day the violation occurs.

Violation #2: Failure to Submit Adequate Waste Management Plan

15. The Dairy General Order requires the submission of reports, including a Waste Management Plan (WMP) for the production area of the dairy facility, as detailed in Section H of the Dairy General Order. The purpose of the WMP is to ensure that the production area of the dairy facility is designed, constructed, operated and maintained so that dairy wastes generated at a dairy are managed in compliance with the Dairy General Order in order to prevent adverse impacts to groundwater and surface water quality. Attachment B of the Dairy General Order further describes the requirements of a WMP. Submission of the WMP was due in phases pursuant to the schedule in Table 1 of the Dairy General Order, with submission of the final portions of the WMP due no later than 1 July 2009. Board Order R5-2009-0029, dated 23 April 2009, extended the submission of final portions of the WMP to 1 July 2010.
16. The Discharger submitted the final portions of its WMP on 20 September 2010.
17. During the May Inspection, Board staff identified inadequacies and inaccuracies in the Waste Management Plan. Deficiencies in the WMP related to silage leachate storage and liquid manure management. A channel designed to convey silage leachate into the lagoon system contained excessive manure and old feed which prevented leachate from reaching the lagoon system. Leachate instead flowed through a canal into a 3 to 4 acre manured area. The WMP did not reflect actual on-site conditions and management practices.
18. A more extensive evaluation of the WMP submitted to Board staff on 21 September 2010 reveals that the WMP: 1) does not accurately describe the dimensions of the lagoons and settling basins, thus leading to an incorrect conclusion that the storage capacity is more than adequate; 2) lists a critical storage period that is much less than the actual amount of time that waste is stored in the production area, thus leading to an incorrect evaluation of the storage capacity as more than adequate; and 3) includes a Production Area Design & Construction Report and a Waste Management Plan Modification Progress Status Report, both signed by the Discharger, stating that the entire production area drains into ponds and that no modifications of the production area are needed to comply with the General Order.

19. The Prosecution Team alleges the Discharger violated Prohibition A.4 of the Dairy General Order from at least 20 September 2010, until 16 November 2012, for a total of 789 days.
20. The Dairy General Order is issued in part under the authority of Water Code section 13267. Liability for this violation may be imposed pursuant to Water Code Section 13268 which states, in part:
- (a)(1) Any person failing or refusing to furnish technical or monitoring program reports as required by subdivision (b) of Section 13267, is guilty of a misdemeanor and may be liable civilly in accordance with subdivision (b).
- (b)(1) Civil liability may be administratively imposed by a regional board . . . in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs.

Violation #3: Failure to Comply With Cleanup Directives

21. On 11 June 2012 the Executive Officer for the Central Valley Water Board issued Cleanup and Abatement Order (CAO) R5-2012-0708 (Exhibit 12) to the Discharger to address the immediate water quality threats from Tosta Dairy identified during the 1 May 2012 Inspection.
22. The following directives of the CAO have not been complied with:
- A) Directive 1: Develop a plan for the Cleanup of the Production Area (Production Area Cleanup Plan) of the Dairy by 25 June 2012;
- i. On 5 July 2012, the Discharger's consultant, Western Dairy Design Associates, electronically submitted a Production Area Cleanup Plan in response to Directive 1. (Exhibit 13)
 - ii. The plan that was submitted on 5 July 2012 was deemed incomplete by Board staff (Exhibit 14) on 10 August 2012.
 - iii. On 26 July 2012, Board staff performed a follow-up inspection (26 July Inspection) and noted none of the manure appeared to have been removed from the production area, but instead appeared to be relocated to other areas within the production area (Exhibit 15).
 - iv. On 10 August 2012, the Assistant Executive Officer for the Central Valley Water Board issued a letter to the Discharger discussing the status of the Discharger's compliance with the CAO. The 5 July 2012 submitted Production Area Cleanup Plan was deemed unrealistic because it did not include a specific schedule for the cleanup of the manure, and did not include an estimate of the total volume of manure and wastewater to be removed. The plan for the use of the removed manure was deemed unrealistic as the land identified for manure application in the submitted plan is insufficient to use all of the manure to be removed if agronomic application rates are to be maintained.
 - v. The plan is 145 days late as 16 November 2012.

B) Directive 1A: Removal of slurry manure in the 3 to 4 acre central portion of the production area by 27 August 2012

- i. During the May Inspection, Board staff observed an area of native soil that the Discharger uses to store liquid wastewater, solid manure, and slurry manure. The mismanagement and excessive manure of the 3 to 4 acre area resulted in the backup of manure into the corral in the northeast corner of the production area. This area has not been prepared or designed to store waste, and is not contained or graded to prevent ponding of wastewater. Staff estimates this area to be approximately 3-4 acres with manure one to three feet deep in places (the 3-4 acre area).
- ii. On 3 July 2012 Central Valley Water Board staff performed a follow-up inspection (3 July Inspection) (Exhibit 16) on Tosta Dairy to assess compliance with the directives of the CAO. Removal of manure from the production area had not started as of the date of the inspection. The CAO required removal of manure to begin by 2 July 2012.
- iii. Board staff conducted inspections on 12 July 2012 (Exhibit 17) (12 July Inspection), 17 July 2012 (Exhibit 18) (17 July Inspection), and 26 July 2012 (26 July Inspection) and did not observe commencement of manure removal activities.
- iv. During an inspection on 5 September 2012 (Exhibit 19) (5 September Inspection) Board staff noted that a medium-sized loader was removing manure from the 3-4 acre manure disposal area and stacking it immediately west of the lagoon complex. It appeared that manure generated by the current herd was being pushed into Settling Basin #1, rather than into the 3-4 acre area. A large amount of solid manure, slurry manure, and liquid wastewater still remained in the 3-4 acre area.
- v. On 11 October 2012 Board staff observed during an inspection (11 October Inspection) minimal removal activity (Exhibit 20).
- vi. During an inspection on 30 October 2012 (Exhibit 21) (30 October Inspection), Board staff observed that manure generated by the current herd was once again being placed in the 3-4 acre area, rather than in the settling basins.
- vii. The manure has not been removed from the 3-4 acre area. Compliance with this Directive is 82 days late as of 16 November 2012.

C) Directive 1B: Removal of manure from the two settling basins

- i. On the 1 May 2012 Inspection, Board staff identified violations including the lack of management of existing settling basins, including excessive vegetation, manure on and adjacent to the embankments, solid manure being used to reinforce embankments, lack of staff gages, and an inability to move water between most of the settling basins and lagoons. Both of the settling basins lacked any freeboard.
- ii. On the 12 July Inspection, Staff noted that manure relocation had commenced at Settling Basin #1. On the 17 July Inspection, Staff noted that manure solids had been removed and stacked on the embankments of Settling Basins #1 and #2, but that significant amounts of wastewater were still present in the basin.

- iii. During the 5 September Inspection, Board staff noted Settling Basin #1, which had two to three feet of freeboard at the time of the last inspection on 26 July 2012, had no freeboard. Also, manure generated by the current herd was being pushed into Settling Basin #1 instead of being placed in the 3 to 4 acre manure disposal area. Settling Basin #2 still contained significant amounts of manure.
- iv. During the 11 October Inspection, Board staff observed Settling Basin #1 overtopping the southern and northern embankments and adjacent dirt access roads.
- v. During an inspection on 22 October 2012 (Exhibit 22) (22 October Inspection), a small manure berm had been constructed along the south side of Settling Basin #1 to prevent the discharge of wastewater from that basin into the Naglee Burk canal.
- vi. During the 30 October Inspection, Board staff observed Settling Basin #1 was lowered in the level of liquids but Settling Basin #2 was now overtopping.
- vii. The manure has not been removed from the settling basins. Compliance with this Directive is 51 days late as of 16 November 2012.

D) Directive 6: Submit a revised waste management plan that describes how the settling basins and lagoons will operate in conformance with the Dairy General Order, including a description of modifications needed to manage slurry manure within the existing constructed settling basin/lagoon system.

- i. Dairy General Order Section H.1.b provides that if the design, construction, operation, and/or maintenance of the dairy facility does not comply with the specifications and prohibitions in the Dairy General Order, the WMP must propose modifications and a schedule for modifications that will bring the dairy facility into compliance.
- ii. The lack of maintenance of the conveyances between the lagoons resulted in an inability to operate the lagoons and settling basins in conformance with the Dairy General Order.
- iii. Staff has not received a revised WMP which is 82 days late as of 16 November 2012.

E) Directive 7: Submit a Groundwater Remediation Plan if groundwater samples indicate the waste disposal caused pollution to groundwater.

- i. Staff determined groundwater monitoring samples exceeded water quality objectives, as described in Finding 11 of this Complaint, causing pollution of groundwater. Staff has not received a Groundwater Remediation Plan, which is 51 days late as of 16 November 2012.

23. Liability for violations of the CAO may be imposed pursuant to Water Code Section 13268 or 13350 in an amount not to exceed one thousand dollars (\$1,000) or five thousand dollars (\$5,000), respectively, for each day the violation occurs.

Proposed Administrative Civil Liability

24. Pursuant to Water Code section 13327, in determining the amount of civil liability, the regional board shall take into consideration the nature, circumstances, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on the ability to continue in business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters as justice may require.
25. On 17 November 2010, the State Water Board adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy (Enforcement Policy). The Enforcement Policy was approved by the Office of Administrative Law and became effective on 20 May 2010. The Enforcement Policy establishes a methodology for assessing administrative civil liability. The use of this methodology addresses the factors that are required to be considered when imposing a civil liability. This policy can be found at:

http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final111709.pdf.
26. The administrative civil liability was derived from the use of the penalty methodology in the Enforcement Policy, as explained in detail in Attachment A. The proposed civil liability takes into account such factors as the Discharger's culpability, history of violations, ability to pay and continue in business, and other factors as justice may require.
27. Based on consideration of the above facts, and after applying the penalty methodology and allowing for staff costs pursuant to the Enforcement Policy, the Executive Officer of the Central Valley Water Board proposes that civil liability be imposed administratively on the Discharger in the amount of **\$1,140,713**. The specific factors considered in this penalty are detailed in Attachment A.
28. Payment of the assessed liability amount does not absolve the Discharger from complying with the General Order or the MRP, the terms of which remain in effect. Notwithstanding the issuance of this Complaint, the Central Valley Water Board retains the authority to assess additional penalties for violations of waste discharge requirements and/or applicable orders for which civil liability have not yet been assessed, or for violations that may subsequently occur.
29. Issuance of this Complaint is an enforcement action and is therefore exempt from the provisions of the California Environmental Quality Act (Pub. Res. Code § 21000 et seq.) in accordance with title 14, California Code of Regulations sections 15308 and 15321 subsection (a) (2).

THE DISCHARGER IS HEREBY GIVEN NOTICE THAT:

1. The Executive Officer of the Central Valley Water Board proposes that the Discharger be assessed an Administrative Civil Liability in the amount of **\$1,140,713**.

2. A hearing on this matter will be conducted at the Central Valley Water Board meeting scheduled on **31 January/1 February 2013**, unless one of the following occurs by **14 December 2012**:
 - a) The Discharger waives the hearing by completing the attached form (checking the box next to Option #3) and returning it to the Central Valley Water Board, along with payment for the proposed civil liability of **one million one hundred and forty thousand seven hundred and thirteen dollars (\$1,140,713)**; or
 - b) The Central Valley Water Board agrees to postpone any necessary hearing after the Discharger requests to engage in settlement discussions by checking the box next to Option #4 on the attached form, and returns it to the Board along with a letter describing the issues to be discussed; or
 - c) The Central Valley Water Board agrees to postpone any necessary hearing after the Discharger requests a delay by checking the box next to Option #5 on the attached form, and returns it to the Board along with a letter describing the issues to be discussed.
3. If the Regional Water Board holds a hearing, it may choose to impose an administrative civil liability in the amount proposed or for a different amount, decline to seek civil liability, or refer the matter to the Attorney General to have a Superior Court consider enforcement. If this matter proceeds to hearing, the Prosecution Team reserves the right to seek an increase in the civil liability amount to cover the costs of enforcement incurred subsequent to the issuance of this administrative civil liability complaint through hearing.
4. There are no statutes of limitations that apply to administrative proceedings. The statutes of limitations that refer to "actions" and "special proceedings" and are contained in the California Code of Civil Procedure apply to judicial proceedings, not an administrative proceeding. See *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal. App. 4th 29, 48; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, §405(2), p. 510.)

ORIGINAL SIGNED BY ROBERT D. BUSBY

For PAMELA C. CREEDON, Executive Officer

19 November 2012

Date

**WAIVER OF 90-DAY HEARING REQUIREMENT FOR
ADMINISTRATIVE CIVIL LIABILITY COMPLAINT**

By signing this waiver, I affirm and acknowledge the following:

1. I am duly authorized to represent Henry J. Tosta (Owner and Operator) dba Henry Tosta Dairy, Henry J. Tosta Jr. Family, Limited Partnership and Henry J. Tosta Trust (Owner), (hereinafter "Discharger") in connection with Administrative Civil Liability Complaint R5-2012-0561 (hereinafter the "Complaint");
2. I am informed that California Water Code section 13323, subdivision (b), states that, "a hearing before the regional board shall be conducted within 90 days after the party has been served" with the Complaint;
3. ☐ **(Check here if the Discharger will waive its right to a hearing and accept the proposed liability amount of one million, one hundred forty thousand seven hundred and thirteen dollars (\$1,140,713)).** I hereby waive any right the Discharger may have to a hearing before the Central Valley Regional Water Quality Control Board (Central Valley Water Board) within ninety (90) days of service of the Complaint; and

I certify that the Discharger will be liable for **\$1,140,713, in full.**

The Discharger shall remit payment, by check, which will contain a reference to "ACL Complaint R5-2012-0561" and will be made payable to the "State Water Resources Control Board Cleanup and Abatement Account". Payment must be received by the Central Valley Water Board by **14 December 2012** or this matter will be placed on the Central Valley Water Board's agenda for adoption at the **31 January 2013/1 February 2013** Central Valley Water Board meeting.

I understand that payment of the **\$1,140,713** in full is not a substitute for compliance with applicable laws and that continuing violations of the type alleged in the Complaint may subject the Discharger to further enforcement, including additional civil liability.

-or-

4. ☐ **(Check here if the Discharger will waive the 90-day hearing requirement, but wishes to engage in settlement negotiations. The Central Valley Water Board must receive information from the Discharger indicating a controversy regarding the assessed penalty at the time this waiver is submitted, or the waiver may not be accepted.)** I hereby waive any right the Discharger may have to a hearing before the Regional Water Board within 90 days after service of the complaint but reserve the ability to request a hearing in the future. I certify that the Discharger will promptly engage the Central Valley Water Board staff in discussions to resolve the outstanding violation(s). By checking this box, the Discharger is *not* waiving its right to a hearing on this matter. By checking this box, the Discharger requests that the Central Valley Water Board delay the hearing so that the Discharger and Central Valley Water Board staff can discuss settlement. It remains within the discretion of the Central Valley Water Board to agree to delay the hearing. A hearing on the matter may be held before the Central Valley Water Board if these discussions do not resolve the liability proposed in the Complaint. The Discharger agrees that this hearing may be held after the 90-day period referenced in California Water Code section 13323 has elapsed.

-or-

5. ☐ **(Check here if the Discharger will waive the 90-day hearing requirement in order to extend the hearing date and/or hearing deadlines. The Central Valley Water Board must receive information from the Discharger indicating a controversy regarding the assessed penalty at the time this waiver is submitted, or the waiver may not be accepted. Attach a separate sheet with the amount of additional time requested and the rationale.)** I hereby waive any right the Discharger may have to a hearing before the Regional Water Board within 90 days after service of the complaint but reserve the ability to request a hearing in the future. By checking this box, the Discharger requests that the Central Valley Water Board delay the hearing and/or hearing deadlines so that the Discharger may have additional time to prepare for the hearing. It remains within the discretion of the Central Valley Water Board to approve the extension.

6. If a hearing on this matter is held, the Central Valley Water Board will consider whether to issue, reject, or modify the proposed Administrative Civil Liability Order, or whether to refer the matter to the Attorney General for recovery of judicial civil liability. Modification of the proposed Administrative Civil Liability Order may include increasing the dollar amount of the assessed civil liability.

(Print Name and Title)

(Signature)

(Date)

ATTACHMENT A

Penalty Methodology: Specific Factors Considered

ATTACHMENT B
Penalty Calculation for Civil Liability

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY ORDER R5-2013-0095

IN THE MATTER OF

HENRY J. TOSTA (DBA HENRY TOSTA DAIRY), HENRY J. TOSTA JR. FAMILY LIMITED
PARTNERSHIP, AND HENRY J. TOSTA TRUST
SAN JOAQUIN COUNTY

This Administrative Civil Liability Order (hereafter Order) is issued to Henry J. Tosta (dba Henry Tosta Dairy), Henry J. Tosta Jr. Family Limited Partnership, and Henry J. Tosta Trust (hereafter collectively referred to as Discharger) based on findings that the Discharger violated Cleanup and Abatement Order (CAO) No. R5-2012-0708 and provisions of the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (Dairy General Order). Provisions of California Water Code Sections 13268 and 13350 authorize the imposition of Administrative Civil Liability.

The Regional Water Quality Control Board, Central Valley Region (hereinafter Central Valley Water Board) finds, with respect to the Discharger's acts, or failure to act, the following:

BACKGROUND

1. Henry J. Tosta operates Henry Tosta Dairy (Tosta Dairy) located at 20662 San Jose Road, Tracy, San Joaquin County. The Henry J. Tosta Jr. Family Limited Partnership owns the real property located at 20662 San Jose Road, Tracy, San Joaquin County.
2. The Tosta Dairy is enrolled under the Dairy General Order, which was adopted by the Central Valley Water Board on 3 May 2007. The facility is currently an operating dairy and, as of 31 December 2011, houses 1,196 mature cows. As an enrolled facility, the Tosta Dairy is subject to the requirements of the Dairy General Order for regulatory purposes.

CHRONOLOGY OF EVENTS

3. On 1 May 2012 the Central Valley Water Board performed a routine compliance inspection of the Tosta Dairy. During the 1 May 2012 inspection, Board staff identified violations of the Dairy General Order and inadequacies and deficiencies in the Waste Management Plan, including the discharge of slurry manure into areas not designed to contain waste, resulting in the discharge of manure constituents to groundwater; excessive accumulation of manure within the production area; and failure to produce an adequate Waste Management Plan.
4. On 11 June 2012 the Executive Officer for the Central Valley Water Board issued Cleanup and Abatement Order (CAO) R5-2012-0708 to the Discharger to address the immediate water quality threats from the Tosta Dairy identified during the 1 May 2012 Inspection.

5. Staff conducted four inspections of the Tosta Dairy between the date of issuance of the CAO and 10 August 2012 and identified an ongoing failure to comply with deadlines and directives in the CAO and ongoing threats to water quality.
6. On 10 August 2012, the Assistant Executive Officer issued a letter notifying the Discharger of his failure to comply with deadlines and directives in the CAO.
7. Staff conducted four inspections of the Tosta Dairy between 10 August 2012 and 19 November 2012, and identified an ongoing failure to comply with deadlines and directives in the CAO and ongoing threats to water quality.
8. On 19 November 2012, the Executive Officer issued Administrative Civil Liability Complaint (Complaint) No. R5-2012-0561 to the Discharger recommending that the Central Valley Water Board assess the Discharger an administrative civil liability in the amount of \$1,140,713.
9. Staff conducted an additional five inspections since the issuance of the Complaint to monitor the Discharger's progress with the directives of the CAO and compliance with the Dairy General Order.

REGULATORY CONSIDERATIONS

10. On 3 May 2007, the Central Valley Water Board adopted the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order No. R5-2007-0035 (hereinafter Dairy General Order) (Exhibit 1) and a Monitoring and Reporting Program (hereinafter MRP) that accompanies the Dairy General Order (Exhibit 2). The Dairy General Order and the MRP contain reporting requirements for dairies regulated by the General Order. The General Order became effective on 9 May 2007. The Dairy General Order is a set of general waste discharge requirements that apply to owners and operators of existing milk cow dairies that (1) submitted a Report of Waste Discharge in response to the Central Valley Water Board's 5 August 8, 2005 request and (2) have not expanded operations since 17 October 2005.
11. Water Code Section 13268 states, in part: (a)(1) [a]ny person failing or refusing to furnish technical or monitoring program reports as required by subdivision (b) of Section 13267, is guilty of a misdemeanor and may be liable civilly in accordance with subdivision (b).
12. Water Code section 13350 states, in part: (a) [a] person who (1) violates a cease and desist order or cleanup and abatement order hereafter issued, reissued, or amended by a regional board or the state board, or (2) in violation of a waste discharge requirement, waiver condition, certification, or other order or prohibition issued, reissued, or amended by a regional board or the state board, discharges waste, or causes or permits waste to be deposited where it is discharged, into the waters of the state, or (3) causes or permits any oil or any residuary product of petroleum to be deposited in or on any of the waters of the state, except in accordance with waste discharge requirements or other actions or provisions of this division, shall be liable civilly, and remedies may be proposed, in accordance with subdivision (d) or (e).

VIOLATIONS

13. Violation #1: The Prosecution Team alleges the Discharger violated Prohibition A.4 of the Dairy General Order by discharging manure waste to groundwater from at least 1 May 2012, the date of the initial inspection, until 16 November 2012, for a total of 200 days. The Prosecution Team selected 1 May 2012 as the start date of this violation given that the manure waste at the Tosta Dairy remained unchanged from the 1 May 2012 Inspection until the time when Board staff sampled groundwater on 12 July 2012.
14. Violation #2: The Prosecution Team alleges the Discharger violated Section H of the Dairy General Order by failing to submit an adequate waste management plan from at least 20 September 2010, until 16 November 2012, for a total of 789 days.
15. Violation #3: The Prosecution Team alleges that the Discharger violated directives 1, 1A, 1B, 6 and 7 of CAO R5-2012-0708.
 - A) Violation #3a: CAO Directive 1: Submittal of Production Area Cleanup Plan: As of 16 November 2012, Directive 1 (Develop a plan for the Cleanup of the Production Area of the Dairy) is 145 days late.
 - B) Violation #3b: CAO Directive 1A: Removal of Slurry Manure in the Central Portion of the Production Area: As of 16 November 2012, Directive 1A (Removal of slurry manure in the 3 to 4 acre central portion of the production area) is 82 days late.
 - C) Violation #3c: CAO Directive 1B: Removal of Manure from Two Settling Basins: As of 16 November 2012, Directive 1B (Removal of manure from the two settling basins) is 51 days late.
 - D) Violation #3d: CAO Directive 6: Submission of Revised WMP: As of 16 November 2012, Directive 6 (Submit a revised waste management plan that describes how the settling basins and lagoons will operate in conformance with the Dairy General Order including a description of modifications needed to manage slurry manure within the existing constructed settling basin/lagoon system) is 82 days late.
 - E) Violation #3e: CAO Directive 7: Submission of Groundwater Remediation Plan: As of 16 November 2012, Directive 7 (Submit a Groundwater Remediation Plan if groundwater samples indicate the waste disposal caused pollution to groundwater) is 51 days late.
16. Water Code section 13268(b)(1) provides that civil liability may be administratively imposed by a regional board in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs.
17. Water Code section 13350 states at section (e)(1): The civil liability on a daily basis shall not exceed five thousand dollars (\$5,000) for each day the violation occurs.

18. An administrative civil liability may be imposed pursuant to the procedures described in Water Code section 13323. An administrative civil liability complaint alleges the act or failure to act that constitutes a violation of law, the provision of law authorizing administrative civil liability to be imposed, and the proposed administrative civil liability.
19. Pursuant to Water Code section 13327, in determining the amount of any civil liability imposed, the Board is required to take into account the nature, circumstances, extent, and gravity of the violations, whether the discharges are susceptible to cleanup or abatement, the degree of toxicity of the discharges, and, with respect to the violator, the ability to pay, the effect on the violator's ability to continue business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violations, and other matters that justice may require.
20. On 17 November 2008 the State Water Resources Control Board adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy (Enforcement Policy). The Enforcement Policy establishes a methodology for assessing discretionary administrative civil liability. Use of the methodology addresses the factors used to assess a penalty under Water sections 13327 and 13385 subdivision (e) including the Discharger's culpability, history of violations, ability to pay and continue in business, economic benefit, and other factors as justice may require. The required factors under Water Code sections 13327 and 13385 subdivision (e) have been considered using the methodology in the Enforcement Policy as explained in detail in Attachment A to this Order and shown in the Penalty Calculation for Civil Liability spreadsheets in Attachment B of this Order. Attachments A and B are attached hereto and incorporated herein by reference.
21. Maximum Civil Liability: The maximum administrative civil liability that may be assessed pursuant to Water Code sections 13350 and 13268 is \$2,732,000.
22. Minimum Civil Liability: The minimum administrative civil liability according to the Enforcement Policy is equal to the economic benefit plus 10%. Based upon evidence received, the economic benefit is substantially less than the \$826,991 listed in Attachment A.
23. After considering Attachment A, the Board adjusted the proposed penalty downward in consideration of "other factors that justice may require." The Discharger has taken preliminary steps to remove excess manure from portions of the site, and has obtained funding to conduct additional activities to bring the site into compliance. In light of those factors, the penalty is reduced to \$685,000. This amount exceeds the economic benefit described in Finding 22.
24. Issuance of this Administrative Civil Liability Order to enforce Water Code Division 7 is exempt from the provisions of the California Environmental Quality Act (Pub. Res. Code § 21000 et seq.) in accordance with title 14, California Code of Regulations sections 15308 and 15321 subsection (a) (2).
25. This Order is effective and final upon issuance by the Central Valley Water Board. Payment must be received by the Central Valley Water Board no later than thirty (30) days from the date on which this Order is issued.

26. In the event that the Discharger fails to comply with the requirements of this Order, the Executive Officer or her delegate is authorized to refer this matter to the Attorney General's Office for Enforcement.
27. Any person aggrieved by this action of the Central Valley Water Board may petition the State Water Board to review the action in accordance with Water Code section 13320 and California Code of Regulations, title 23, sections 2050 and following. The State Water Board must receive the petition by 5:00 p.m., 30 days after the date that this Order becomes final, except that if the thirtieth day following the date that this Order becomes final falls on a Saturday, Sunday, or state holiday, the petition must be received by the State Water Board by 5:00 p.m. on the next business day. Copies of the law and regulations applicable to filing petitions may be found on the Internet at: http://www.waterboards.ca.gov/public_notices/petitions/water_quality or will be provided upon request.

IT IS HEREBY ORDERED THAT:

1. Pursuant to Water Code section 13323, Henry J. Tosta (dba Henry Tosta Dairy), Henry J. Tosta Jr. Family Limited Partnership, and Henry J. Tosta Trust shall be assessed an Administrative Civil Liability in the amount of six hundred eighty-five thousand dollars (\$685,000).
2. Payment shall be made no later than thirty days from the date of issuance of this Order. Payment shall be made in the form of a check made payable to the State Water Resources Control Board Waste Discharge Permit Fund, and shall have the number of this Order written upon it.

I, Kenneth D. Landau, Assistant Executive Officer, do hereby certify that the foregoing is a full, true, correct copy of an Order adopted by the California Regional Water Quality Control Board, Central Valley Region, on 25 July 2013.

Original signed by

KENNETH D. LANDAU, Assistant Executive Officer

Attachment A: Narrative Summary of Administrative Civil Liability Penalty Methodology
Attachment B: Administrative Civil Liability Penalty Methodology Matrix

Attachment A – ACL Complaint No. R5-2012-0561
Specific Factors Considered for Administrative Civil Liability
HENRY J. TOSTA (DBA HENRY TOSTA DAIRY), HENRY J. TOSTA JR. FAMILY LIMITED
PARTNERSHIP, AND HENRY J. TOSTA TRUST
SAN JOAQUIN COUNTY

The State Water Board's *Water Quality Enforcement Policy* (Enforcement Policy) establishes a methodology for determining administrative civil liability by addressing the factors that are required to be considered under California Water Code sections 13350, subdivision (a) and 13327. Each factor of the nine-step approach is discussed below, as is the basis for assessing the corresponding score. The Enforcement Policy can be found at:
http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final111709.pdf.

I. Violation 1: Discharge to Groundwater from the Production Area

The following steps are used in determining administrative civil liability for the production area discharges.

Step 1 – Potential for Harm for Discharge Violations

The “potential harm to beneficial uses” factor considers the harm that may result from exposure to the pollutants in the illegal discharge, while evaluating the nature, circumstances, extent, and gravity of the violation(s). A three-factor scoring system is used for each violation or group of violations: (1) the potential for harm to beneficial uses; (2) the degree of toxicity of the discharge; and (3) whether the discharge is susceptible to cleanup or abatement.

Factor 1: Harm or Potential Harm to Beneficial Uses.

This factor evaluates direct or indirect harm or potential for harm from the violation. A score between 0 and 5 is assigned based on a determination of whether the harm or potential for harm to beneficial uses ranges from negligible (0) to major (5). The designated beneficial uses of groundwater are municipal and domestic water supply¹, agricultural supply, industrial service supply, and industrial process supply.

Dairy waste, including manure and urine, can seriously impact groundwater unless the discharges are carefully managed. Such discharges can introduce nitrogen, salts, and bacteria to the groundwater, either by the movement of waste constituents through soil or by the movement of waste constituents through man-made conduits such as improperly constructed wells. Nitrogen contamination, in the form of both nitrate and ammonia, pose a serious threat to beneficial uses, including the drinking water supply. Groundwater beneath the dairy is very shallow, at a depth of less than 10 feet. The bottom of lagoons and settling basins at the dairy are likely at or near the groundwater surface, providing a direct conduit between wastes and groundwater. The placement of manure and wastewater in the production area has been identified as moderate threat to beneficial uses resulting in exceedances of primary and secondary MCLs thereby justifying score of **3** is assigned for this factor.

¹ Although groundwater in monitoring wells at the dairy contains total dissolved solids (TDS) in excess of 3,000 mg/l, evidence suggests that the TDS concentration is the result of on-site dairy operations and does not necessarily represent the natural quality of shallow groundwater in the area.

Factor 2: The Physical, Chemical, Biological or Thermal Characteristics of the Discharge.

A score between 0 and 4 is assigned based on a determination of the risk or threat of the discharged material. "Potential receptors" are those identified considering human, environmental, and ecosystem exposure pathways. Dairy waste contains nitrogen, salts, and bacteria. Nitrogen, total dissolved solids (TDS). Nitrate-nitrogen has a primary Maximum Contaminant Level (MCL) of 10mg/L. TDS has a secondary MCL ranging between 500mg/L and 1500mg/L. Because dairy waste poses a threat to beneficial uses, a score of **3** was assigned for this factor.

Factor 3: Susceptibility to Cleanup or Abatement.

A score of 0 is assigned for this factor if 50% or more of the discharge is susceptible to cleanup or abatement. A score of 1 is assigned if less than 50% of the discharge is susceptible to cleanup or abatement. This factor is evaluated regardless of whether the discharge was actually cleaned up or abated by the discharger. In this case, more than 50% of the discharge was susceptible to abatement, because the Discharger, once the source of the discharge (manure and manure wastewater) was removed, could have pumped underlying groundwater and applied it to cropland at agronomic rates for use as a fertilizer. Therefore, a factor of **0** is assigned.

Final Score – "Potential for Harm"

The scores of the three factors are added to provide a Potential for Harm score for each violation or group of violations. In this case, a **final score of 5** was calculated. The total score is then used in Step 2, below.

Step 2 – Assessment for Discharge Violations

This step addresses administrative civil liabilities for the discharge based on a per-day basis.

Per Day Assessments for Discharge Violations

The "per day" factor (determined from Table 2 of the Enforcement Policy) is 0.15. The deviation from requirements is major because the Dairy General Order requirements (Prohibition A.4) prohibiting the discharge of waste that results in 1) discharge of waste constituents in a manner which could cause degradation of groundwater, or 2) contamination or pollution of groundwater, have been rendered ineffective.

The length of the alleged violation is from the date of the first inspection, 1 May 2012 through 16 November 2012, for a total of 200 days.

The Per Day Assessment is calculated as: (0.15 factor from Table 2) x (200 days) x (\$5,000 per day). The **Initial Liability** value is **\$150,000**.

Step 3 – Per Day Assessment for Non-Discharge Violation

The Enforcement Policy states that the Central Valley Water Board shall calculate an initial liability for each non-discharge violation. In this case, this factor does not apply because all of the violation is related to the discharge of wastewater, and the liability was determined in Step 2.

Step 4 – Adjustment Factors

The Enforcement Policy allows for multi-day violations to be consolidated provided specific criteria are satisfied. The Enforcement Policy also describes three factors related to the violator's conduct that should be considered for modification of the initial liability amount: the violator's culpability, efforts to cleanup or cooperate with regulatory authority, and the violator's compliance history. After each of these factors is considered for the violations involved, the applicable factor should be multiplied by the proposed amount for each violation to determine the revised amount for that violation.

Multiple Day Violations

For violations that last more than thirty (30) days, the daily assessment can be less than the calculated daily assessment, provided that it is no less than the per day economic benefit, if any, resulting from the violation. The violation at issue does not qualify for the alternative approach to the penalty calculation under the Enforcement Policy because none of the three required criteria can be met. The continuance of this violation causes daily detrimental impacts to the water quality of the groundwater where the accumulation of manure waste causes degradation and pollution to groundwater; results in an economic benefit that can be measured on a daily basis where the Discharger benefits every day from not removing manure and wastewater as it accumulates; and the Discharger knew and could have taken action to mitigate or eliminate the violation.

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of **1.5**. The Discharger did not follow the Operation and Maintenance Plan that was part of its Waste Management Plan (WMP) for the Dairy, requiring regular cleanout of lagoons and settling basins in the production area. Manure and wastewater was placed in areas of the production area not identified for manure storage on maps associated with the WMP. Despite repeated attempts during the 12 July 2012, 17 July 2012 and 26 July 2012 inspections reminding the Discharger of cleanup obligations under the Dairy General Order and the CAO, the Discharger failed to comply with cleanup of the 3 to 4 acre central portion of the Production Area potentially exacerbating the water quality issues at the Tosta Dairy. No effort was made to ensure that dairy waste did not come into contact with shallow groundwater. Dairy manure was allowed to accumulate and even bury one of the monitoring wells. A reasonably prudent person under similar circumstances would have managed manure and wastewater to minimize or prevent prohibited discharges to groundwater, in compliance with the Dairy General Order. Accordingly, the culpability factor has been set at the maximum.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Discharger failed to operate and maintain the Dairy in a manner to prevent adverse impacts to water quality, an essential component of the requirements of the Dairy General Order. Moreover, the Discharger has not complied with the cleanup measures required in the CAO, which would

have reduced further harm and minimize the source of the pollution. Therefore, the cleanup and cooperation multiplier factor has been set at the maximum, **1.5**.

History of Violation

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. The Discharger has a history of violations of water quality laws.

On 1 March 2002, staff from the Central Valley Water Board and the Department of Fish and Game (DFG) investigated a discharge of wastewater from cropland operated by the Henry Tosta Dairy into a Naglee-Burk drain; this cropland is now part of the current Henry Tosta Dairy production area. Mr. Tosta explained to the investigators that he had been pumping wastewater out onto approximately 15 acres for approximately one year instead of using his waste pond. The reason given for not using the waste pond was the lack of a pump and distribution system. No crop was growing in the field receiving the wastewater. In addition, manure scraped from the freestall barn had been deposited into the Main Drain canal of the Naglee-Burk Irrigation District south of the production area (Exhibit 23). On 28 March 2002, staff from the Central Valley Water Board and DFG conducted a follow-up inspection of the Henry Tosta Dairy to determine what steps had been taken to abate the discharge of 1 March 2002. The inspection revealed ongoing discharges of wastewater from the same field into the Naglee-Burk drain and no significant improvements (Exhibit 24). On 3 February 2003, a settlement agreement was reached between Henry Tosta and the Deputy District Attorney for San Joaquin County in the sum of \$141,730 for discharges of manure wastewater to the Naglee-Burk Canal (Exhibit 25). The Prosecution Team has factored this violation as a history of violation for the purposes of this Complaint, since the reason for the surface water discharge in 2003 was that the Discharger lacked infrastructure to deliver wastewater to cropland for agronomic use. This lack of infrastructure is closely related to the lack of proper manure handling which led to the discharge to groundwater in this violation. Staff assessed a multiplier value of **1.1**.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability for the violation is determined by multiplying the Revised Initial Liability by the multipliers associated with each of the Adjustment Factors discussed above.

Total Base Liability Amount: This value is calculated as the Revised Initial Liability (\$150,000) X Adjustment Factors **(1.5) (1.5) (1.1)** and is equal to **\$371,250**.

II. Violation #2: Failure to Submit Adequate Waste Management Plan

Because this is a non-discharge violation, Step Nos. 1 and 2 of the Enforcement Policy's administrative civil liability methodology are not addressed.

Step 3 – Per Day Assessment for Non-Discharge Violation

The per-day factor for the violation is 0.85. This factor is determined by a matrix analysis based upon the Potential for Harm and the Deviation from Applicable Requirements.

a. The Potential for Harm for the violation is determined to be major. The General Order uses the preparation and implementation of a complete and accurate Waste Management Plan (WMP) as the tool to determine if a dairy has sufficient capacity for the waste generated by the herd, if the dairy production area is protected from flooding, if modifications are needed to the production area to ensure that the dairy waste management operations are protective of water quality, and includes an Operation and Maintenance Plan that will provide a schedule and list of activities needed to maintain waste management features at the dairy. An evaluation of the WMP submitted to Staff for the dairy on 21 September 2010 reveals that the WMP: 1) does not accurately describe the dimensions of the lagoons and settling basins, thus leading to an incorrect evaluation of the storage capacity as more than adequate; 2) lists a critical storage period that is much less than the actual amount of time that waste is stored in the production area, thus leading to an incorrect evaluation of the storage capacity as more than adequate; and 3) includes a Production Area Design & Construction Report and a Waste Management Plan Modification Progress Status Report, both signed by the Discharger, stating that the entire production area drains into ponds and that no modifications of the production area are needed to comply with the General Order. As a requirement of the Dairy General Order, the failure to submit an adequate WMP creates a major potential for harm to the regulatory program of the Dairy General Order requiring the submission of the WMP to prevent adverse impacts to groundwater and surface water quality.

b. The Deviation from Applicable Requirements is major. Although the Discharger submitted a Waste Management Plan within the required time period, the Discharger's submission was deficient for the reasons explained above. The Discharger failed to submit an adequate Waste Management Plan and in effect, disregarded the requirement in the General Order that the plan accurately reflect existing conditions and identify needed remedial measures.

The length of the violation is alleged from the date of the submission of the WMP, 20 September 2010 through 16 November 2012, for a total of 789 days late. Therefore the Per Day Assessment is calculated as (0.85 factor from Table 3) x (789 days) x (\$1000 per day). The Initial Liability value is \$670,650.

Step 4 – Adjustment Factors

Multiple Day Violations

The failure to submit an adequate plan is a one-time violation that does not result in an economic benefit that can be measured on a daily basis. Therefore, an adjustment can be made.

This results in a Revised Initial Liability Amount as follows:

Revised Initial Liability = (.85) X (32 days of violation) X (\$1,000) = **\$27,200**

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of **1.5**. The documents signed by the

Discharger as part of the WMP all include a certification that states: "I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment." The Discharger was therefore aware that it was important that the information in the WMP be accurate in reflecting the operations and maintenance of the Tosta Dairy, yet when compared to the Discharger's actual operations and maintenance, demonstrates inherent deficiencies and inaccuracies in the information provided by the Discharger.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Discharger was given a multiplier value of **1.5**. The General Order, as a phased-in set of requirements, provides multiple points at which dischargers are required to evaluate various documents regarding their operations, correct any problems, and modify plans as needed to reflect changed conditions. The Discharger never submitted any modifications to the WMP submitted in 2010, even though a reasonable person could have recognized that there were serious problems with manure management in the production area that merited a review of the WMP provisions.

History of Violation

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. For the reasons stated above, Staff assessed a multiplier value of **1.1**.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability for the violation is determined by multiplying the Revised Initial Liability by the multipliers associated with each of the Adjustment Factors discussed above.

Total Base Liability Amount for Lagoon Discharges: This value is calculated as the Revised Initial Liability (\$27,200) X Adjustment Factors **(1.5) (1.5) (1.1)** and is equal to **\$67,320**.

III. Violation #3: Failure to Comply with the Cleanup and Abatement Order Directives

A. Violation #3a: CAO Directive 1: Submittal of Production Area Cleanup Plan

The following steps are used in determining administrative civil liability for the failure to develop and submit a Production Area Cleanup Plan in compliance with Directive 1 of CAO R5-2012-0708 (CAO), addressing 1) removal of all slurry manure in the 3 to 4 acre central portion of the Production Area by 27 August 2012; 2) removal of all manure within the two settling basins by 27 September 2012; and 3) removal of excess vegetation, excess manure, and manure used

for construction on the six lagoons, and installation of staff gages, by 27 September 2012.

Because this is a non-discharge violation, Step Nos. 1 and 2 of the Enforcement Policy's administrative civil liability methodology are not addressed.

Step 3 – Per Day Assessment for Non-Discharge Violation

The per-day factor for the violation is 0.40. This factor is determined by a matrix analysis based upon the Potential for Harm and the Deviation from Applicable Requirements.

a. The Potential for Harm for the violation is determined to be moderate. The Discharger submitted an incomplete plan on 5 July 2012 and referenced cleanup activities in a second document received 3 August 2012. The Discharger was notified by letter dated 10 August 2012 that the plan and cleanup activities were inadequate. Absent a complete cleanup plan that contains a time schedule and specific information on who will handle manure removal, how manure will be removed, and where removed manure will go, the cleanup of a significant quantity of waste as in this case is unlikely to proceed in a timely manner and, has not been completed as of the date of this Complaint. A plan is typically a pre-requisite for implementation. The failure to submit the Production Area Cleanup Plan potentially increases the potential for harm of manure waste discharge to groundwater in the production area. Not having a plan, in of itself, however, does not necessarily mean cleanup is not addressed. At the same time, the placement of waste in violation of the General Order undermines the regulatory program of the Dairy General Order; absent a complete cleanup plan, the Tosta Dairy remains in violation of the Dairy General Order's requirements. In all, the Prosecution Team assessed moderate potential for harm.

b. The Deviation from Applicable Requirements is moderate. The Discharger's initial submission was ten days late but Board staff deemed the plan inadequate; therefore the effectiveness of the requirement was only partially achieved.

The length of the violation is alleged from June 25, 2012 (the date that the cleanup plan was due) through 16 November 2012, for a total of 145 days late. Therefore the Per Day Assessment is calculated as (0.4 factor from Table 3) x (145 days) x (\$1,000 per day). The Initial Liability value is \$58,000.

Step 4 – Adjustment Factors

Multiple Day Violations

For violations that last more than thirty (30) days, the daily assessment can be less than the calculated daily assessment, provided that it is no less than the per day economic benefit, if any, resulting from the violation. The failure to prepare and submit a plan does not cause daily detrimental impacts to the environment. Therefore, an adjustment can be made. The Water Board Prosecution Team recommends applying the alternative approach to civil liability calculation provided by the Enforcement Policy. Using this approach, the calculation of days of violation will include the first day of violation, plus one additional day of violation for each five-day period up to the 30th day of violation, and thereafter, plus one additional day of violation for each 30-day period.

This results in a Revised Initial Liability Amount as follows:

Revised Initial Liability = (.4) X (10 days of violation) X (\$1,000) = **\$4,000**

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of **1.2**. Where the Discharger submitted a report, albeit incomplete, such circumstances do not warrant a 1.4 or above where there is no evidence of willful or intentional negligence. The Discharger's culpability is higher than a neutral 1.0 where a reasonable and prudent person under similar circumstances would have submitted a complete report addressing the cleanup requirements under the CAO.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Discharger was cooperative in submitting a plan, although it was not timely or complete. However, even after notifying the Discharger of the incomplete submittal, the Discharger has failed to provide a plan to supplement the initial submittal. Exhibit 14 identifies a letter, dated 10 August 2012 from the Assistant Executive Officer to the Discharger discussing the status of the Discharger's compliance with the CAO, including how the submission of the Discharger's cleanup plan was unrealistic because land applying the excess manure is insufficient if agronomic application rates are to be maintained. Therefore, the Discharger is assessed a multiplier value of **1.1**.

History of Violation

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. For the reasons stated above, Staff assessed a multiplier value of **1.1**.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability for the violation is determined by multiplying the Revised Initial Liability by the multipliers associated with each of the Adjustment Factors discussed above.

Total Base Liability Amount: This value is calculated as the Revised Initial Liability (\$4,000) X Adjustment Factors **(1.2) (1.1) (1.1)** and is equal to **\$5,808**.

b. Violation #3b: CAO Directive 1A: Removal of Slurry Manure in the Central Portion of the Production Area

Because this is a non-discharge violation, Step Nos. 1 and 2 of the Enforcement Policy's administrative civil liability methodology are not addressed.

Step 3 – Per Day Assessment for Non-Discharge Violation

The per-day factor for the violation is 0.85. This factor is determined by a matrix analysis based upon the Potential for Harm and the Deviation from Applicable Requirements.

- a. The Potential for Harm for the violation is determined to be major. As long as the manure remains in this area it poses a threat to underlying shallow groundwater and to the existing beneficial uses, as detailed in the potential for harm section of Violation #1.
- b. The Deviation from Applicable Requirements is major. The General Order requires that waste be placed in areas identified in a WMP for waste storage and where the storage of the waste will not result in degradation, contamination, or pollution of groundwater. Placing slurry manure on unprepared native soil with no controls to contain the waste is a major deviation from the requirements of the General Order and the requirement in the CAO.

The length of the violation is alleged from 27 August 2012 (the date removal of manure from this area was to be complete) through 16 November 2012, a total of 82 days. Therefore the Per Day Assessment is calculated as (0.85 factor from Table 3) x (82 days) x (\$5,000 per day). The Initial Liability value is \$348,500.

Step 4 – Adjustment Factors

Multiple Day Violations

The violation at issue does not qualify for the alternative approach to penalty calculation under the Enforcement Policy. The continuance of this violation: causes daily detrimental impacts to the water quality of the groundwater; results in an economic benefit that can be measured on a daily basis where the Discharger benefits every day from not expending the money to remove the slurry manure and transport it offsite; and the Discharger knew and had control to take action to mitigate or eliminate the violation.

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of **1.5**. The Discharger was notified in 30 June 2007 of the Dairy's enrollment under the General Order and was provided with a copy of the General Order. On 21 September 2010, the Discharger submitted a signed WMP to the Board describing, among other things, his manure management practices. The WMP did not identify the central area as a manure storage area. Additionally, Board staff followed up and inspected Tosta Dairy on 3 July 2012, 12 July 2012, 17 July 2012, and 26 July 2012, and continued to find the Discharger placing and storing the solid manure and liquid wastewater in the 3-4 acre area. Placement of newly-generated manure in the 3-4 acre area ceased briefly but resumed by Board staff's inspection on 30 October 2012. The Discharger was aware of the requirements of the Dairy General Order, but chose to manage his waste in violation of the Dairy General Order. In the status letter of 10 August 2012 in Exhibit 14, Staff specifically rejected a request for an extension of time to clean manure in the production area because of concerns that the cleanup would not be completed before winter rains; Staff also cited the lack of any progress in cleaning up the central area and, in fact, the continued use of the central area for dumping of newly-generated manure as additional reasons to deny the extension request. Therefore, the Prosecution Team assessed a multiplier of 1.5.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Discharger was given a deadline of 27 August 2012 to remove the slurry manure in the central area. On 5 September 2012, Staff inspected Tosta Dairy and determined that a minimal amount of manure rearrangement was being done, but that no manure had been removed from the area. Subsequent inspections, referenced above, indicate that only minimal progress was conducted in the cleanup of this area. Therefore, the Discharger is assessed a multiplier value of **1.5**.

History of Violation

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. For the reasons stated above, Staff assessed a multiplier value of **1.1**.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability for the violation is determined by multiplying the Initial Liability by the multipliers associated with each of the Adjustment Factors discussed above.

Total Base Liability Amount: This value is calculated as the Initial Liability (\$348,500) X Adjustment Factors **(1.5) (1.5) (1.1)** and is equal to **\$826,538**. In considering the maximum statutory liability of \$5,000 per day of violation, the Total Base Liability exceeds the statutory maximum of \$410,000 (82 days x \$5,000). Therefore, the Total Base Liability must be adjusted to **\$410,000**.

c. Violation #3c: CAO Directive 1B: Removal of Manure from Two Settling Basins

Because this is a non-discharge violation, Step Nos. 1 and 2 of the Enforcement Policy's administrative civil liability methodology are not addressed.

Step 3 – Per Day Assessment for Non-Discharge Violation

The per-day factor for the violation is 0.85. This factor is determined by a matrix analysis based upon the Potential for Harm and the Deviation from Applicable Requirements.

a. The Potential for Harm for the violation is determined to be major. Settling basins are required to have freeboard to prevent the overtopping of the basin embankments by waste and the subsequent uncontrolled release of waste from the basin. The two settling basins, at the time of the initial inspection on 1 May 2012, neither settling basin had any freeboard. Although the Discharger removed some material from the settling basins, subsequent deposition of waste into the settling basins resulted in overtopping of some embankments and threatened discharge of waste into the Naglee-Burk Canal.

b. The Deviation from Applicable Requirements is major. Settling basins are to be maintained and regularly cleaned so that they can function to separate solid and liquid fractions of waste. Freeboard is to be maintained to ensure that embankments are not

overtopped by waste and subsequent loss of containment and embankment integrity. Failure to remove the manure from the settling basins is violation of the CAO directive. Therefore, because the requirement was rendered ineffective, the violation was a major deviation from applicable requirements.

The length of the violation is alleged from 27 September 2012 (the date that removal of all manure within the two settling basins was to be complete) through 16 November 2012, a total of 51 days. Therefore the Per Day Assessment is calculated as (0.85 factor from Table 3) x (51 days) x (\$5,000 per day). The Initial Liability value is \$216,750.

Step 4 – Adjustment Factors

Multiple Day Violations

The violation at issue does not qualify for the alternative approach to penalty calculation under the Enforcement Policy. The continuance of this violation: causes daily detrimental impacts to the water quality of the groundwater; results in an economic benefit that can be measured on a daily basis where the Discharger benefits every day from not expending the money and resources to appropriately manage the settling basins, effectively reaping an advantage in the cost of operating the dairy Facility; and the Discharger knew and had control to take action to mitigate or eliminate the violation.

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of **1.5**. The Discharger was notified in 30 June 2007 of the Tosta Dairy's enrollment under the Dairy General Order and was provided with a copy of the General Order. On 21 September 2010, the Discharger submitted a signed WMP to the Board describing, among other things, his manure management practices. The Discharger was therefore aware of the need to regularly maintain his settling basins. In the Status letter of 10 August 2012, Staff specifically rejected a request for an extension of time to clean manure in the production area because of concerns that the cleanup would not be completed before winter rains. At an inspection on 5 September 2012, Settling Basin #1 had no freeboard. At an inspection on 10 October 2012, Settling Basin #1 was overtopping and flooding a road inside the production area. At an inspection on 22 October 2012, staff noted that a small manure berm had been constructed along Settling Basin #1 to prevent manure and wastewater from discharging across an access road and into the Naglee-Burk Canal. These conditions indicate a complete lack of intent to comply with the General Order.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. Because the settling basins have not been cleaned of manure, the Discharger was given a higher factor than a neutral score of 1.0. Unlike the removal of manure from the production area, Board staff noted that manure removal activities in the settling basins commenced around 12 July 2012. On 17 July 2012, Board staff noted the manure solids had been removed and stacked on the embankments of Settling Basins #1 and #2, but that significant amounts of wastewater were

still present in the basin. On 5 September 2012 Central Valley Water Board staff noted Settling Basin #1, which had two to three feet of freeboard at the time of the last inspection on 26 July 2012, had no freeboard. Also, manure generated by the current herd was being pushed into Settling Basin #1 instead of being placed in the 3-4 acre manure disposal area. Settling Basin #2 still contained significant amounts of manure. At the 10 October Inspection Board staff observed settling basin #1 overtopping the southern and northern embankment and adjacent dirt access roads. At the 22 October Inspection, Board staff observed a small manure berm had been constructed along the south side of Settling Basin #1 to prevent the discharge of wastewater from that basin into the Naglee Burk canal. On 30 October 2012, Board staff observed Settling Basin #1 was lowered in the level of liquids but Settling Basin #2 was now overtopping.

Board staff observed manure removal activities in Settling Basin #1 and #2 but, given the ineffectiveness of the Discharger's activities and conduct, assessed a multiplier value of **1.2**.

History of Violation

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. For the reasons stated above, Staff assessed a multiplier value of **1.1**.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability for the violation is determined by multiplying the Initial Liability by the multipliers associated with each of the Adjustment Factors discussed above.

Total Base Liability Amount: This value is calculated as the Initial Liability (\$216,750) X Adjustment Factors **(1.5) (1.2) (1.1)** and is equal to **\$429,165**. In considering the maximum statutory liability of \$5,000 per day of violation, the Total Base Liability exceeds the statutory maximum of \$255,000 (51 days x \$5,000). Therefore, the Total Base Liability must be adjusted to **\$255,000**.

d. Violation #3d: CAO Directive 6: Submission of Revised WMP

Because this is a non-discharge violation, Step Nos. 1 and 2 of the Enforcement Policy's administrative civil liability methodology are not addressed.

Step 3 – Per Day Assessment for Non-Discharge Violation

The per-day factor for the violation is 0.55. This factor is determined by a matrix analysis based upon the Potential for Harm and the Deviation from Applicable Requirements.

a. The Potential for Harm for the violation is determined to be moderate. A plan is typically a pre-requisite before implementation. The existing WMP failed to identify areas of the production area requiring improvement to ensure that storage of waste is protective of water quality. The failure to submit revisions to the WMP potentially increases the potential for harm of manure waste discharge to groundwater in the production area. The placement of waste in violation of the General Order undermines the regulatory program of the Dairy General Order; absent a revised WMP, the Tosta Dairy remains in violation of the Dairy General Order's requirements.

b. The Deviation from Applicable Requirements is major. The Discharger failed to submit revisions to the WMP and in effect, disregarded the requirement. Staff routinely requests the submittal of revised WMPs when inspections indicate that revision of the WMP is necessary to represent on site conditions or correct deficiencies.

The length of the violation is alleged from 27 August 2012 (the date the revised WMP was due) through 16 November 2012, for a total of 82 days late. Therefore the Per Day Assessment is calculated as (0.55 factor from Table 3) x (82 days) x (\$1,000 per day). The Initial Liability value is \$45,100.

Step 4 – Adjustment Factors

Multiple Day Violations

The failure to submit a plan is a one-time violation that does not result in an economic benefit that can be measured on a daily basis. Therefore, an adjustment can be made.

This results in a Revised Initial Liability Amount as follows:

Revised Initial Liability = (.55) X (8 days of violation) X (\$1,000) = **\$4,400**

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of **1.5**. The CAO issued to the Discharger clearly stated the requirement to submit the revised WMP. The Status letter sent to the Discharger on 10 August 2012 reminded the Discharger of the upcoming deadline to submit the revised WMP. The revised WMP has not been submitted as of the date of this Complaint.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. Because the revised WMP has not been submitted and no explanation for the lack of the revised WMP has been provided, the Discharger was assessed a higher factor than a neutral score of 1.0. Instead, the Discharger is given a multiplier value of **1.2**.

History of Violation

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. For the reasons stated above, Staff assessed a multiplier value of **1.1**.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability for the violation is determined by multiplying the Revised Initial Liability by the multipliers associated with each of the Adjustment Factors discussed above.

Total Base Liability Amount: This value is calculated as the Revised Initial Liability (\$4,400) X Adjustment Factors **(1.5) (1.2) (1.1)** and is equal to **\$8,712**.

e. Violation #3e: CAO Directive 7: Submission of Groundwater Remediation Plan

Because this is a non-discharge violation, Step Nos. 1 and 2 of the Enforcement Policy's administrative civil liability methodology are not addressed.

Step 3 – Per Day Assessment for Non-Discharge Violation

The per-day factor for the violation is 0.55. This factor is determined by a matrix analysis based upon the Potential for Harm and the Deviation from Applicable Requirements.

- a. The Potential for Harm for the violation is determined to be moderate. Without a plan, groundwater impacts will remain unremediated. A plan is typically a pre-requisite before implementation. As long as the submission of the Groundwater Remediation Plan remains outstanding, the Discharger is taking no steps to remediate currently impacted groundwater; absent the Groundwater Remediation Plan, the Tosta Dairy remains in violation of the Dairy General Order's requirements.
- b. The Deviation from Applicable Requirements is major. The Discharger failed to submit the groundwater remediation plan and in effect, disregarded the requirement of the CAO.

The length of the violation is alleged from 27 September 2012 (the date the plan was due) through 16 November 2012, for a total of 51 days late. Therefore the Per Day Assessment is calculated as (0.55 factor) x (51 days) x (\$1,000 per day). The Initial Liability value is \$28,050.

Step 4 – Adjustment Factors

Multiple Day Violations

The failure to submit a plan is a one-time violation that does not result in an economic benefit that can be measured on a daily basis. Therefore, an adjustment can be made. The Water Board Prosecution Team recommends applying the alternative approach to civil liability calculation provided by the Enforcement Policy. Using this approach, the calculation of days of violation will include the first day of violation, plus one additional day of violation for each five-day period up to the 30th day of violation, and thereafter, plus one additional day of violation for each 30-day period.

This results in a Revised Initial Liability Amount as follows:

Revised Initial Liability = (.55) X (7 days of violation) X (\$1,000) = **\$3,850**

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of **1.5**. The CAO clearly stated the

requirement to submit the groundwater remediation plan if groundwater sampling indicated groundwater pollution. The Status letter issued by Staff on 10 August 2012 states that Staff's evaluation of groundwater data received from the Discharger's consultant on 20 July 2012 indicates negative impacts to groundwater from dairy operations and states that a plan for the remediation of the groundwater, including an engineering evaluation of the impacts of the existing lagoons and settling basins on groundwater quality and a proposal for remedial measures is required by 27 September 2012. None of the elements of the plan have been received.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. Because the remediation plan has not been submitted and no explanation for the lack of the remediation plan has been provided, the Discharger was given a higher factor than a neutral score of 1.0. Instead, the Discharger is given a multiplier value of **1.2**.

History of Violation

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. For the reasons stated above, Staff assessed a multiplier value of **1.1**.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability for the violation is determined by multiplying the Revised Initial Liability by the multipliers associated with each of the Adjustment Factors discussed above.

Total Base Liability Amount: This value is calculated as the Revised Initial Liability (\$3,850) X Adjustment Factors **(1.5) (1.2) (1.1)** and is equal to **\$7,623**.

The follow penalty methodology steps apply to all prior violations.

Step 6 - Ability to Pay and Ability to Continue in Business

The ability to pay and to continue in business factor must be considered when assessing administrative civil liabilities. Below is a brief analysis of the Discharger's financial situation, which was further informed by the Horner report and testimony, and the Fuhrman Declaration. Based upon this testimony, the Board believes that the Discharger may lack the ability to pay this liability.

Besides the Heifer Ranch operated on property leased from the Echeverria Brothers Dairy General Partnership, the Discharger owns and operates a 1,196 cow dairy in the immediate area. The Tosta Dairy is an ongoing business that generates profits that may be used to pay off the assessed penalty. The Discharger owns additional parcels of land in the vicinity of the Heifer Ranch, together with a restaurant/bar in a neighboring community. Public records show that the Discharger is the legal property owner of the following parcels:

APN 229-060-15 (agricultural); APN 239-270-06 (residential); APN 209-290-06 (agricultural); APN 209-290-07 (agricultural); APN 209-300-18 (agricultural); APN 239-160-02; APN 239-160-16 (dairy); APN 239-160-15 (agricultural); APN 212-090-01 (agricultural); APN 239-270-02 (agricultural); APN 209-300-18 (agricultural); APN 249-020-06; APN 229-060-16 (agricultural); APN 229-060-17 (agricultural).

In all, based on the information publicly available, the Prosecution Team finds that Henry Tosta has the ability to pay the proposed administrative civil liability amount.

Step 7 – Other Factors as Justice May Require

If the Central Valley Water Board believes that the amount determined using the above factors is inappropriate, the amount may be adjusted under the provision for “other factors as justice may require,” but only if express findings are made to justify this.

Costs of Investigation and Enforcement Adjustment

The costs of investigation and enforcement are “other factors as justice may require”, and should be added to the liability amount. Staff of the Central Valley Water Board has spent over 100 hours associated with the investigation of the discharges alone, independent of time required for preparation of the enforcement action. The State Water Board Office of Enforcement has directed that all regions are to use a value of \$150 per hour for staff costs. For this case, staff time for investigation of the discharges is \$15,000. The Enforcement Policy states that staff costs should be added to the liability amount.

Step 8 – Economic Benefit

The Enforcement Policy directs the Water Board to determine any Economic Benefit Amount of the violation based upon the best available information. The Enforcement Policy suggests that the Water Board compare the Economic Benefit Amount to the Adjusted Total Base Liability and ensure that the Adjusted Total Base Liability is at a minimum, 10 percent greater than the Economic Benefit Amount. Doing so should create a deterrent effect and will prevent administrative civil liabilities from simply becoming the cost of doing business.

The Prosecution Team has estimated the economic benefit of non-compliance at \$751,810. This estimation is based on actions the Discharger should have taken to comply with the Dairy General Order (Exhibit 26):

- Install Lagoon Management System
- Submission of Clean-up Plan
- Submission of Revised WMP
- Submission of Accurate WMP in 2010
- Submission of Remediation Groundwater Plan
- Avoided Manure Management cost
- Avoided General Maintenance

The economic benefit of non-compliance plus 10% is **\$826,991**. The Adjusted Total Base Liability Amount is greater than 110 percent, and therefore, no adjustment is necessary based on the economic benefit analysis.

Final adjusted liability

The final adjusted liability is **\$1,125,713** plus **\$15,000** in staff costs, or **\$1,140,713**.

Step 9 – Maximum and Minimum Liability Amounts

The maximum and minimum amounts for discharge violation must be determined for comparison to the amounts being proposed. These values are calculated in the ACL Complaint, and the values are repeated here.

Maximum Liability Amount:

Violation #	Requirement	Days of Violation	Maximum Potential Liability
1	Dairy General Order Prohibition A.4: Discharge or disposal of waste resulting in the pollution of groundwater	200	\$1,000,000
2	13267 Failure to Submit Adequate Waste Management Plan	779	\$789,000
3a	CAO Directive 1: Develop a plan for cleanup of the Production Area	145	\$145,000
3b	CAO Directive 1A: Remove manure in 3 to 4 acre central portion of production area	82	\$410,000
3c	CAO Directive 1B: Remove all manure within two settling basins	51	\$255,000
3d	CAO Directive 6: Submission of Revised WMP	82	\$82,000
3e	CAO Directive 7: Submission of Remediation Groundwater Plan	51	\$51,000
		TOTAL	\$2,732,000

Minimum Liability Amount: the minimum liability according to the Enforcement Policy is equal to the economic benefit plus 10%, which estimated to be \$826,991.

Step 10 – Final liability Amount

The final liability amount consists of the added amounts for each violation, with any allowed adjustments, provided amounts are within the statutory minimum and maximum amounts. Without further investigation of the discharge, calculation of economic benefits, and additional staff time, the proposed Administrative Civil Liability is **\$1,140,713**.

